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Philip Marcus

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# THE TAKING AND DESTRUCTION OF PROPERTY UNDER A DEFENSE AND WAR PROGRAM†

PHILIP MARCUS\*

## IV. THE TAKING OF PROPERTY FOR WAR PURPOSES UNDER FOREIGN LAW<sup>1</sup>

### A. Some Comparisons

There are at least two outstanding differences in the law and practice of the English Commonwealth and Germany, on the one hand, and of the United States on the other, in respect to the taking of property for war purposes. In the first two, in general, there has been a broad grant of power to administrative officials to take both real and personal property. In the United States the distinct tendency has been to give the executive piece-meal authority and to grant greater powers in respect to realty than personalty. In fact, the chain of express statutory authority is far from complete at present.<sup>2</sup>

The second major distinction is that in the United States there has been a distinct tendency to take title to realty<sup>3</sup> as well as to personalty, whereas in the English Commonwealth and in Germany legal authority and actual practice has rarely gone beyond the use of real property for war purposes. The taking of title to realty seems to be exceptional. Thus, in the United Kingdom and other parts of the British Empire the term "requisition" generally has a more restricted meaning in respect to realty than it has to most sorts of personalty. It has been said of the United Kingdom that, "When

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†This is the second and final installment of this article, the first having appeared in (1942) 27 CORNELL LAW QUARTERLY 317 [Ed.].

\*The views expressed are those of the author and not necessarily those of any government agency.

<sup>1</sup>Throughout this article reference has been made, to some extent, to the law and practice in other countries in respect to some particular aspect of the taking and destruction of property for war purposes. In this part of the memorandum an attempt has been made to collate some significant characteristics of taking under foreign law. Some of the contingencies provided for and some of the language used might well be considered by the authorities in this country.

The picture given here is by no means complete, largely because of the limitations of the writer.

<sup>2</sup>See *supra* p. 340 *et seq.* This is especially true of personalty. There is no such general expropriation statute in respect to personalty as there is in respect to realty. Although there is much to be said for construing the Requisitioning Act of October 16, 1941, broadly, in view of the fact of its similarity to the Act of October 10, 1940, which Congress was aware had been construed by the Administration of Export Control and the Board of Economic Warfare to cover almost all kinds of personalty, the legislative history of the Requisitioning Act is not too comforting on this score. Some Congressmen have introduced bills for the taking of certain types of personalty such as automobiles, on the assumption that authority therefor was lacking.

<sup>3</sup>See *infra*, Pt. VI, C.

dealing with land a distinction should be drawn between acquisition and requisition, the latter being the temporary use as distinct from the permanent acquisition of property. So far as goods other than vessels, vehicles and aircraft are concerned, a requisition is treated as and compensated as a compulsory acquisition,"<sup>4</sup> but there is reason to believe that even as to personalty the preference is to "requisition for the emergency."<sup>5</sup> "Acquisition" and "requisition" are similarly distinguished in Canada.<sup>6</sup>

In the United States the term "requisition" has been used in statutes, presidential proclamations, executive orders, and commandeering orders with only occasional clarification of the meaning of the term.<sup>7</sup> No little trouble arose out of requisitioning orders during the last world war because it was not clear whether possession or title was taken. To avoid similar confusion during the present war,<sup>8</sup> a distinction such as that found useful in England might be adopted here; but if care is taken by administrative officials to spell out in the requisitioning order what they are taking, the term presents no particular difficulty. In view of the indefinite use of "requisitioning" in this country it seems clear that where requisitioning is provided by statute, it includes a taking of title as well as a temporary possession, unless the context indicates the contrary.<sup>9</sup>

## B. British Commonwealth

1. *England*.<sup>10</sup>—The basic powers of the English government over property rights stem from the Emergency Powers Act of 1939<sup>11</sup> and the Emergency

<sup>4</sup>(1940) 84 SOL. J. 387. This distinction is made in the British Compensation (Defence) Act, 1939, 2 & 3 GEO. VI, c. 75. It has been stated that the prerogative power (emergency power of the Crown) allows the taking of temporary possession. Note, (1942) *Requisitioning of Land*, 86 SOL. J. 53.

<sup>5</sup>See *Swift v. MacBean* [1942] 1 ALL ENG. REP. 126, 129.

<sup>6</sup>See Statutes of Canada, 1940, 4 GEO. VI, c. 28.

<sup>7</sup>It has been considered to include the complete taking of something, including title, as compared to regulation, *Campbell v. Chase National Bank of N. Y.*, 5 F. Supp. 156, 175 (S. D. N. Y. 1933), *aff'd on other grounds*, 71 F. (2d) 669 (C. C. A. 2d 1934), *appeal dismissed sub nom.*, *United States v. Campbell*, 293 U. S. 592 (1934).

<sup>8</sup>The government's embarrassment may not be revealed until after the war when it seeks to return the property to one who refuses and claims that title had been taken from him. A title searcher might well pause at the sight of a notice which merely says certain property is hereby requisitioned by the United States. The courts occasionally have been confronted with the problem whether title or use has been requisitioned. *E.g.*, *The Katingo Hadjipatera*, 40 F. Supp. 546 (S. D. N. Y. 1941) (ship); *United States v. Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1st 1921) (canal).

<sup>9</sup>Congress knows how to limit the meaning of the term. Cf. PUB. L. No. 178, 77th Cong., 1st Sess.: "requisition the use of, or the possession of foreign vessels."

<sup>10</sup>The United Kingdom consists of England, Scotland, Northern Ireland, and Wales. Many of the emergency laws, regulations, and statutory rules and orders issuing from London apply to all. In some cases applicability to Scotland and Northern Ireland is permissive; in others, they are made inapplicable to one or both; in some instances, they are applicable with minor modifications.

<sup>11</sup>L. R. Statutes, 1939, Pt. II, c. 62.

Powers (Defence) Act of 1940.<sup>12</sup> These Acts, in addition to conferring extremely broad powers upon the executive branch of the government to carry on the war program, expressly provide for the taking of property. Under these enabling Acts, a number of defence regulations and statutory orders have been issued in respect to the compulsory taking of property. In addition, a number of permanent acts exist under which property may be taken for war and defence purposes; where there is necessity for permanent acquisition of realty these acts are wont to be resorted to.

Under the defence regulations, authority is conferred to take drastic steps in regard to property rights in protected places<sup>13</sup> and in protected areas.<sup>14</sup> The use of certain highways and rights of way may be limited or proscribed.<sup>15</sup> Power is given to do any work on land by any member of His Majesty's forces in the course of his duty as such, or by any person authorized by a competent authority.<sup>16</sup> Possession of land may be taken by competent authorities for purposes which include "maintaining supplies and services essential to the life of the community";<sup>17</sup> practically unlimited powers have been given to do with land as desired or to prohibit the uses thereof,<sup>18</sup> including the power to work coal.<sup>19</sup> Water undertakers are authorized to secure additional sources of supply from lakes and other bodies of water.<sup>20</sup> For the better utilization of agricultural land, the Minister of Agriculture and Fisheries can require the owner, if the latter is at fault, to recondition the land, can purchase the land by agreement, or, if his order is not obeyed, may take it by compulsion.<sup>21</sup> Air raid wardens and other specified civilian defence workers have

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<sup>12</sup> 3 & 4 GEO. VI, c. 20 (1940). See also the Emergency Powers (Defence) (No. 2) Act, 1940, 3 & 4 GEO. VI, c. 45.

<sup>13</sup> Defence General Regulations (vol. 1, 10th ed.) Reg. No. 12.

<sup>14</sup> *Id.*, Reg. No. 13.

<sup>15</sup> *Id.*, Reg. No. 16.

<sup>16</sup> *Id.*, Regs. Nos. 50 and 50b. Under this regulation, conversely, the doing of any work on particular land may be prohibited. Anything removed may be stored, sorted, and, so far as appears to be valueless, disposed of.

<sup>17</sup> *Id.*, Reg. No. 51. Advance notice is not necessary, but in practice a requisitioning notice is usually given, Note, (1942) *Requisitioning of Land*, 86 SOL. J. 53. A requisitioning notice to the effect that possession would be taken by a specified future date has been held not to relieve a purchaser from his contract. *In re Winslow*, (1942) 86 SOL. J. 53. On its facts the decision is questionable unless, as pointed out in the comment, it is recognized that not infrequently such notices are withdrawn prior to the time when possession is to be taken.

<sup>18</sup> *Id.*, Reg. No. 51. Certain provisions of a number of permanent statutes have been suspended. See Regs. Nos. 51 and 52. As to land, the major number of requisitions have been made for the Army, with a substantial number being for the Royal Air Force and the Navy. Requisitioning also has been resorted to frequently in respect to schemes for rehousing of the homeless and for civil evacuation. See Report of Mr. John W. Morris on the requisitioning of land and buildings and the operation of the Compensation (Defence) Act of 1939, Cmd. 6313 (1941).

<sup>19</sup> S. R. & O. No. 92 (1942). Consignments of coal may be diverted. Reg. No. 56b.

<sup>20</sup> S. R. & O. No. 502 (1942).

<sup>21</sup> Agricultural Land Utilization Act, 1931, 21 & 22 GEO. VI, 241. See HAILSHAM,

been given power to enter upon premises and to take steps to extinguish fires and to protect persons and property from fire.<sup>22</sup>

Authority to requisition property other than land includes the power to use any chattel in the United Kingdom, any British ship or aircraft, and anything thereon wherever the ship or aircraft is located (but not Dominion ships, aircraft, or cargo);<sup>23</sup> exceptions exist, however, as to currency, gold, securities, or negotiable instruments.<sup>24</sup> Space and accommodations on ships and aircraft<sup>25</sup> may be commandeered as well as contract rights thereto.<sup>26</sup> Orders may be given to persons having power to dispose of chattels outside the United Kingdom,<sup>27</sup> and shares of domestic companies which own or have power to work minerals in foreign countries may be transferred to government nominees but title to land is not to be transferred).<sup>28</sup>

The Minister of Supply may designate undertakings to be controlled.<sup>29</sup> Thereafter they are subject to orders or directions of competent authorities.<sup>30</sup> General control of industry may be effected by designating persons to carry on the undertaking for the government. The control may be partial or entire.<sup>31</sup>

Authority exists for the removal by a recovery officer of chattels left in damaged buildings, if he thinks the damage is such that the chattels, if left, would be liable to destruction, deterioration, or loss. This power is not to be exercised if the owner objects. When removed they are to be stored, but the recovery officer may remove them to a place arranged by the owner. Goods stored cannot be taken away by the owner except at a time agreed upon and with a receipt; the recovery officer, however, may require the owner to remove the chattels stored if he thinks the owner is in a position reasonably to comply with the request. The recovery officer may cleanse or disinfect the chattels, and after consultation with the local medical officer of health, may destroy the chattels if too infected to make disinfection practicable; if disinfection is not practicable, he may destroy them before they are likely to contaminate other premises or chattels.<sup>32</sup> Under the English Defence

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LAWS OF ENGLAND (Supp. 1941) Agriculture, 17, 29-30. He may direct that agricultural land may not be used for other than agricultural purposes. Reg. No. 61.

<sup>22</sup>See (1940) 84 Sol. J. 434.

<sup>23</sup>Reg. No. 53. A transferee may be given clear title, and a prior period of requisition of a ship or aircraft ends upon the beginning of the day the notice of acquisition is served.

<sup>24</sup>Reg. No. 53. The exception refers to the provisions of Reg. No. 53.

<sup>25</sup>Reg. No. 54.

<sup>26</sup>*Ibid.*

<sup>27</sup>*Id.*, Reg. No. 53.

<sup>28</sup>S. R. & O. No. 381 (1942).

<sup>29</sup>Reg. No. 54c.

<sup>30</sup>*Ibid.*

<sup>31</sup>*Id.*, Reg. No. 55.

<sup>32</sup>S. R. & O. No. 1499 (1941). Cf. Reg. No. 60j.

Regulations, in evacuation areas, premises requisitioned by the government are considered unoccupied even if furniture and other goods are present in the premises.<sup>33</sup> In order to facilitate the use of requisitioned empty houses, the Minister of Health has authorized certain local public bodies to requisition furniture or household equipment in any unoccupied premises or stored in any depository of furniture, to furnish accommodations for persons rendered homeless as the direct or indirect consequence of enemy action.<sup>34</sup>

In England, the Army Act of 1881, as renewed annually, provides for the compulsory furnishing, by persons having suitable carriages, of animals and drivers to move regimental stores and baggage along a particular route. Under one section of the Act, a requisition of "emergency" may be issued which may include food and forage for the purposes mentioned in the requisition. In addition, in time of war, requisition may extend to the above items for purposes of purchase as well as hire.<sup>35</sup>

In England much of the necessary requisitioning is done by staffs specially trained and selected for such work.<sup>36</sup> A War Agricultural Executive Committee is consulted in the requisitioning of agricultural land.<sup>37</sup>

2. *Australia*.—The National Security Act passed in 1939<sup>38</sup> authorized the Governor-General<sup>39</sup> to make regulations for public safety and defence. That statute specifically authorized the "taking possession or control, on behalf of the Commonwealth, of any property or undertaking." It also provided for the acquisition, on behalf of the Commonwealth, of all property except land in Australia. An amendatory act in the following year,<sup>40</sup> did not remove this qualification, but did provide that regulations could be made requiring persons to place their property at the disposal of the government.

To a substantial extent, Australian Defense Regulations have followed those of England in respect to the use of land.<sup>41</sup> The statutory orders which provide

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<sup>33</sup>See 85 Sol. J. 434.

<sup>34</sup>See 84 Sol. J. 614.

<sup>35</sup>See *Roadways Transport Development Ltd. v. Attorney General* [1942] 1 All Eng. Rep. 52 (C. A.).

<sup>36</sup>See Report of Mr. John W. Morris on the requisitioning of land and buildings and the operation of the Compensation (Defence) Act of 1939, Cmd. 6313 (1941). For the Army, the actual requisitioning in an Army Command is generally done by Sub-Area Quartering Commandants under the supervision of a high ranking officer, and a few occupied houses have been requisitioned. The Admiralty, the Royal Air Force, and the Ministry of Works and Buildings exercise requisitioning powers through special units of these agencies, or, in some instances, through delegated agencies.

<sup>37</sup>See *supra* note 36.

<sup>38</sup>Commonwealth Act No. 15 (1939).

<sup>39</sup>Held not an unconstitutional delegation of legislative power, *Wishart v. Fraser* (1941) 15 Austr. L. J. 24.

<sup>40</sup>Commonwealth Act No. 44 (1940).

<sup>41</sup>Under National Security (General) Regulations, Reg. No. 55, the use of land may

for taking of personal property are, however, quite numerous<sup>42</sup> and show considerable variance from English practice. Typical is the provision found in the dried fruits order that the Minister, by an order published in the Gazette, may declare that any dried fruit is acquired by the Commonwealth; thereupon the Commonwealth gets absolute property rights free from all claims, and rights in such fruit are converted into claims for compensation.<sup>43</sup>

The Minister of State for Trade and Customs has been given broad acquisition powers which provide for the vesting of title and require that peaceable possession be given to the Government, but apparently not delivery.<sup>44</sup> But the Minister of State for Supply and Development can require any person who manufactures, produces, deals in, or has control of any goods to supply and deliver to the Minister or to a designated person, specified goods within a specified time.<sup>45</sup> Under the Coal Control Regulations, an owner of a coal mine may be ordered to supply coal to any person.<sup>46</sup>

3. *Canada*.—On September 13, 1939, the Department of Munitions and Supply Act<sup>47</sup> came into force. This Act, as amended August 7, 1940,<sup>48</sup> gives the government wide powers over the acquisition and use of real or personal property either by voluntary or compulsory means. The Canadian War Appropriation Act of 1940<sup>49</sup> empowered the Governor in Council to prescribe administrative practices for the acquisition of land, buildings, equipment, stores, materials, and supplies. The Canadian National Resources Mobilization Act of 1940<sup>50</sup> gave the Governor in Council power to require persons

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be subjected to restrictions. Reg. No. 55a provides that fixtures and other structures placed on the land by the Commonwealth are to remain its property, with a right of removal.

<sup>42</sup>*E.g.*, Australian S. R. No. 96 (1939) (Wheat Acquisition Regulation); S. R. No. 129 (1939) (Supply of Goods Regulation); S. R. No. 20 (1940) (ships, space, and accommodations); S. R. No. 189 (1941) (Coal Control Regulation); S. R. No. 30 (1941) (Shipping Requisition Regulation); S. R. No. 18 (1940) (Cold Store Regulation); S. R. No. 79 (1940) (acquisition of tools to work mines); S. R. No. 65 (1940) (dried fruits); General Regulation No. 59 (general control of industry); S. R. No. 282 (1940) (foreign currency). Reg. No. 57 of the National Security (General) Regulations covers the taking of personal property and provides that the Minister may hold, sell, or otherwise dispose of it as if he were the owner.

<sup>43</sup>S. R. No. 65 (1940).

<sup>44</sup>S. R. No. 176, § 44 (1940) (National Security (Prices) Regulation).

<sup>45</sup>S. R. No. 129 (1939).

<sup>46</sup>The Minister may also direct any owner or other person to carry, convey, deliver, or discharge coal to or from any place or ship, S. R. No. 189 (1941).

<sup>47</sup>Statutes of Canada, 1939, 3 Geo. VI, c. 3.

<sup>48</sup>Statutes of Canada, 1940, 4 Geo. VI, c. 31.

<sup>49</sup>Statutes of Canada, 1940, 4 Geo. VI, c. 3. The Supplementary 1940 War Appropriation Act (Statutes of Canada, 1940-41, c. 10) is comparable to the emergency fund appropriations created for the President in this country, in the almost limitless powers given to the governor in council to use the moneys appropriated. The War Appropriations Act of 1941 appropriated additional moneys for similar purposes.

<sup>50</sup>Statutes of Canada, 1940, 4 Geo. VI, c. 13.

to place their services and property at the disposal of His Majesty in the right of Canada for purposes which include public safety and the maintenance of supplies, or services essential to the life of the community.<sup>51</sup> The Royal Canadian Air Force Act of 1940, contained a provision that "The officer commanding any unit of the air force on active service may, subject to regulations, enter upon, take or destroy any private property, real or personal, required to be entered upon, taken or destroyed for the purpose of meeting the emergency."

It is noteworthy that the Canadian Defense Regulations, while containing a number of provisions found in the English Defence Regulations, have no provisions for the requisitioning or acquisition of land although Regulation 48 provides for the requisitioning of property other than land.<sup>52</sup>

Under a Foreign Exchange Acquisition order, residents have been required to sell their holdings of foreign exchange to a Foreign Exchange Control Board.<sup>53</sup>

In respect to commodities, a number of officials known as Controllers have been appointed with comprehensive requisitioning power over the particular commodity under their control.<sup>54</sup>

4. *New Zealand*.—Under the New Zealand Emergency Regulations Act, regulations similar to those of England have been issued regarding the expropriation of property.<sup>55</sup> Authority has been given to take over over-seas securities held by New Zealand residents.<sup>56</sup>

5. *British Colonies*.—In March of 1939, the Crown made an order in council<sup>57</sup> which provided for the security of the Colonies in time of emergency. It could be made applicable by a Governor of a Colony at any time he should decide there was a period of emergency. The powers conferred included the power to take and control property. The Emergency Powers (Defence) Act of 24, 1939, stated that its provisions could be made applicable to the Colonies

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<sup>51</sup>Some examples of provisions for expropriation are P. C. 3555, August 17, 1940 (wool); Canadian Defense Regulations (1940) Regs. 3, 8, 19, 48.

<sup>52</sup>During the last world war a Canadian Order in Council of March 17, 1917, streamlined the provisions of the expropriation law of 1906 and permitted the taking of personal property used with realty as has been done in the United States by the Second War Powers Act.

<sup>53</sup>See (1941) 22 JOURNAL OF THE PARLIAMENTS OF THE EMPIRE, 75 *et seq.*

<sup>54</sup>*E.g.*, P. C. 4996 (1941). The Controller of Chemicals is given power to take possession, or otherwise acquire chemicals and/or equipment, to take possession and use himself or by any person duly authorized by him, of plants and buildings, used or capable of being used for making and/or dealing in any chemicals and/or equipment.

<sup>55</sup>See (1940) 21 JOURNAL OF THE PARLIAMENTS OF THE EMPIRE 524.

<sup>56</sup>See *Hearings before the Subcommittee of Senate Committee on Appropriations on H. R. 5788*, 77th Cong., 1st Sess., 723.

<sup>57</sup>The Emergency Powers Order in Council. See Dale, *War Legislation in the Colonial Empire* (1940) 22 J. COMP. LEG. & INT. L. (3d series) 1-2.



by an order in council. On the following day an order making the Act applicable was issued.<sup>58</sup> The Emergency Powers (Colonial Defence) (Amendment) Order in Council of June 7, 1940, made the Emergency Powers (Defence) Act of 1940 applicable to the Colonies.

The Colonies have issued defense regulations which follow very closely those of the mother country. In addition, most of them have basic expropriation laws and some of them have special laws concerning the taking of property for Army and Navy purposes. After the agreement between the United States and Great Britain which resulted in the United States acquiring a right to lease lands in specified British Colonies in the Western Hemisphere, some of the Colonies passed special expropriation Acts whereby lands could be acquired for the United States by a special procedure.<sup>59</sup>

### C. *Belgium*

Prior to the outbreak of the war realistic Belgium had provided for requisitioning in time of war. The exercise of the power was vested, according to the nature and purpose of the requisition, in competent Ministers and in the officials to whom they should delegate the power: in Provincial Governors, District Commissioners, Burgomasters, and in exceptional cases, in any official, employee, or agent of the State, a Province, or a Commune.<sup>60</sup> The requisitioning power extended to all persons and objects; military took priority over civil requirements, and in the case of the latter, the order of priority was: State, Province, Commune.<sup>61</sup>

### D. *Cuba*

In Cuba, shortly after the attack on Pearl Harbor, laws were passed authorizing the President to expropriate articles and materials necessary for the immediate welfare of the population.<sup>62</sup> He was given power also to take over industrial and agricultural plants and establishments, public utilities, and similar enterprises.<sup>63</sup> At the same time, Government control was established over all forms of transportation and communications,<sup>64</sup> and it was made obligatory, in certain cases, to cultivate certain crops in lieu of sugar cane.<sup>65</sup>

<sup>58</sup>The Emergency Powers (Colonial Defense) Order in Council of August 25, 1939.

<sup>59</sup>*E.g.*, St. Lucia (Lands Acquisition) (United States of America Naval and Air Bases) Ordinance, 1940; British Guiana Acquisition of Land (United States of America Air and Naval Bases) Ordinance, 1940.

<sup>60</sup>UNIVERSAL DIGEST OF LAWS AND ORDINANCES (1938) Vol. II, p. 453.

<sup>61</sup>*Ibid.*

<sup>62</sup>A short summary of some of these emergency laws is found in (April, 1942) BULLETIN OF THE PAN AMERICAN UNION.

<sup>63</sup>(March 21, 1942) 7 FOR. COM. WEEKLY 14.

<sup>64</sup>*Ibid.*

<sup>65</sup>*Ibid.*

Still another law gave the President authority to acquire, repair, construct, or obtain machinery, equipment, and other articles necessary for civilian defense.<sup>66</sup>

#### *E. France*

In France, the General Mobilization Act of July, 1938, empowered the government in war time to requisition material resources. After the Vichy government came into power collectors were appointed to requisition and redistribute available stocks.<sup>67</sup>

#### *F. Germany*<sup>68</sup>

The German Constitution of August 1, 1919, gave the Reich power to enact statutes relating to the expropriation of real property. The Reich did not use this power to enact a general expropriation statute, and in general, the laws of the several states were resorted to when it was desired to take property for public use.<sup>69</sup> Some special expropriation statutes were enacted by the Reich for particular purposes; and the Reich provided for its own procedure, rather than that of any state, in a statute dealing with the enforcement of certain sections of the Versailles Treaty.

On July 13, 1938, a law concerning contributions<sup>70</sup> for defense purposes was enacted,<sup>71</sup> and amended on September 1, 1939.<sup>72</sup> The original law, in terms, was designated to be for defense purposes. The amending law used the term "National" purposes. The Contributions Law applies to the use of personalty, to the transfer of title to personalty, and to the use of real property. It does not apply to the transfer of title to real property.<sup>73</sup>

Contributions of shelter,<sup>74</sup> of food,<sup>75</sup> use of watering places,<sup>76</sup> delivery of

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<sup>66</sup>*Ibid.*

<sup>67</sup>See WORLD ECONOMIC SURVEY (1939-1941), ECONOMIC INTELLIGENCE SERVICE (1941) 38 *et seq.*

<sup>68</sup>See MARIN, EXPROPRIATION FOR PUBLIC USE IN THE DIFFERENT COUNTRIES, International Congress of Social Authorities, Expropriation of Land (Seville, 1928) 42.

<sup>69</sup>There is a striking parallel in this respect to the United States where federal condemnations first relied upon state tribunals and later upon state procedure.

<sup>70</sup>Obligated to contribute are inhabitants, persons who own property within the Reich's territory so far as their property is concerned, and German citizens on board German ships.

<sup>71</sup>"Gesetz ueber Leistungen fuer Wehrzwecke (Wehrleistungsgesetz)", Reichsgesetzblatt, Teil 1, No. 112, p. 887.

<sup>72</sup>"Gesetz ueber Sachleistungen fuer Reichsaufgaben (Reichsleistungsgesetz)", Reichsgesetzblatt, Teil 1, No. 116, p. 1693.

<sup>73</sup>Apparently state laws could be used to take title to realty.

<sup>74</sup>§ 5.

<sup>75</sup>§ 6.

<sup>76</sup>§ 7.

food,<sup>77</sup> delivery of fuel,<sup>78</sup> use of real property, buildings, and bodies of water,<sup>79</sup> delivery of articles of consumption and equipment,<sup>80</sup> use of private communication equipment,<sup>81</sup> sharing of workshops,<sup>82</sup> requisition of electrical power and gas,<sup>83</sup> delivery of movable objects,<sup>84</sup> supply of transportation,<sup>85</sup> aid in servicing of airplanes,<sup>86</sup> and use of boats,<sup>87</sup> may be required by other agencies as well as by the Army.<sup>88</sup> As to a few of the required contributions, provision is made that they need not be given where serious inconvenience to family life would result.

In place of individuals, municipal corporations may be obligated to contribute.<sup>89</sup>

#### G. *The Netherlands Empire*<sup>90</sup>

The Netherlands Constitution provides that expropriation for the common weal can take place only when a preceding law declares that the common weal demands expropriation. It is further provided, however, that the law determines the cases in which previous authorization by law is not required.<sup>91</sup> If in the event of war, immediate possession becomes necessary, expropriation can take place upon order of the highest civil or military authority present.<sup>92</sup> "When it is made known that danger of war exists according to the meaning of the laws of the land, or if war has actually broken out, our Minister of Agriculture, Industry and Commerce, can authorize mayors to confiscate<sup>93</sup> immediately all commodities, raw materials, household articles and fuel in the municipality without any formality."<sup>94</sup>

Under these laws it is clear that both realty and personalty were subject to expropriation by administrative action at the time of the German invasion

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<sup>77</sup>§ 8.

<sup>78</sup>§ 9.

<sup>79</sup>§ 10.

<sup>80</sup>§ 11.

<sup>81</sup>§ 12.

<sup>82</sup>§ 13.

<sup>83</sup>§ 14.

<sup>84</sup>§ 15.

<sup>85</sup>§ 16.

<sup>86</sup>§ 17.

<sup>87</sup>§ 18.

<sup>88</sup>§ 4. Special provisions exist as to equipment and outfit of boats. See § 19.

<sup>89</sup>In turn it may ask for contributions from individuals in the municipality.

<sup>90</sup>The writer is indebted to the Netherlands Information Bureau for translations and information on which most of this subsection is based.

<sup>91</sup>It is also provided that the use of property for the preparation or carrying out of inundations, when demanded by war or danger of war, will be regulated by law.

<sup>92</sup>Expropriation Law, Art. 73.

<sup>93</sup>Expropriation would seem a preferable term since compensation is provided for.

<sup>94</sup>Expropriation Law, Art. 76a. Such authorizations can take place only when the state of war or siege has been declared. Art. 76f.

in 1940, even though under normal conditions expropriation took place by court procedure.

When Holland came under German occupation, the Netherlands Government, moving to London, issued a Royal Decree on May 24, 1940, transferring all assets abroad of Netherlands to the Government for safekeeping during the duration of the war; the Japanese invasion of the Netherlands East Indies evoked a similar decree. In exceptional cases, accelerated restitution is given in advance of the date set for the general return of property to the rightful owners.<sup>95</sup>

It has been said that, in 1940, the Netherlands Minister in London appointed a Netherlands Shipping Committee which subsequently became the Netherlands Shipping and Trading Committee. The Minister of Commerce, Industry and Shipping empowered this Committee to become custodian of all Dutch ships belonging to owners in occupied countries, and of all goods afloat or ashore in any part of the world belonging to or consigned to persons in occupied countries. All cargoes in Dutch ships and all Dutch cargoes in other ships, it is said, were requisitioned by Great Britain upon their arrival in Great Britain.<sup>96</sup>

#### V. PURPOSES FOR WHICH PROPERTY MAY BE TAKEN

That property may be taken for war purposes seems a self-evident statement. Many problems do arise, however, as to the purposes for which property may be taken or destroyed. One of such problems, not here discussed, but noted, is that of interpreting statutes which speak in terms of "military purposes," or some phrase less inclusive than "war purposes."<sup>97</sup> In England, the Defence Regulations expressly provide that the use of land may be taken for purposes of "the public safety, the defence of the Realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community."<sup>98</sup> Similar regulations exist as to the taking of chattels.<sup>99</sup>

In the law of eminent domain the concept that this power can be exercised only for a public use is deeply engrained.<sup>100</sup> The courts have reserved to

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<sup>95</sup>Netherlands News, April 1, 1942, p. 54.

<sup>96</sup>Letter from a correspondent to THE ECONOMIST, September 14, 1940. Claimants could press their claims before special agents in various ports, and if the government did not want the goods they were released to claimants who could prove a right thereto.

<sup>97</sup>Moreover, a number of statutes are specifically limited to a narrow purpose.

<sup>98</sup>Reg. No. 51.

<sup>99</sup>Reg. No. 53.

<sup>100</sup>See Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 B. U. L. REV. 615. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196

themselves the right to determine what is a public use,<sup>101</sup> but their reluctance to review an administrative determination of the necessity or advisability of a taking is marked.<sup>102</sup>

In time of war, especially, the courts are not likely to review seriously an administrative determination that a taking is advisable for the war effort.<sup>103</sup>

The fact that the taking is to bring the government a financial return, in part, does not necessarily violate the test of public use. Insofar as the taking helps to pay for a public improvement, even though the extent of the taking is greater because of the financial return than it would otherwise be, there is judicial authority that such a taking is valid.<sup>104</sup> Whether the courts would be willing to permit a taking for this purpose by itself, rather than as incident to some other power, may be doubted, but it may be expected that greater latitude will be afforded the government in this respect than heretofore has been thought possible. As an aid to or substitute for taxation it has been little explored.

#### *A. Taking Property for a Non-Military Purpose*

The totalistic nature of modern warfare has caused the governments of most belligerents to adopt social and economic measures which probably neither the public at large nor the courts would support in time of peace. But as an incident to the war effort such measures are likely to be held valid. Nor is the taking of property for such purposes likely to be struck down as long as there is a substantial relevance to the war effort.<sup>105</sup> Thus it is believed that, within certain limitations, property may be taken in time of war to improve morale or to preserve or rectify economic conditions detrimental to the war effort.<sup>106</sup> Property has been taken for U. S. O. centers.<sup>107</sup>

U. S. 239, 251 (1905); *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 679 (1896); *In re Manderson*, 51 Fed. 501, 503 (C. C. A. 3d 1892).

<sup>101</sup>*Rindge Co. v. County of Los Angeles*, 262 U. S. 700, 705 (1923); *Block v. Hirsh*, 256 U. S. 135, 154 (1921); *Shoemaker v. United States*, 147 U. S. 282, 298 (1893).

<sup>102</sup>*Barnidge v. United States*, 101 F. (2d) 295 (C. C. A. 8th 1939); *United States v. Threlkeld*, 72 F. (2d) 464 (C. C. A. 10th 1934), *cert. denied*, 293 U. S. 620 (1934). The question of necessity of a taking for public use is a legislative and not a judicial question. *Georgia v. Chattanooga*, 264 U. S. 472, 483 (1923); *Rindge Co. v. County of Los Angeles*, 262 U. S. 700, 709 (1923).

<sup>103</sup>See Note, *Requisitioning of Land* (1942) 86 SOL. J. 53.

<sup>104</sup>*Oklahoma v. Atkinson Co.*, 313 U. S. 508 (1941). Cf. *Buchanan v. United States*, 78 Ct. Cls. 791 (1934), *cert. denied*, 294 U. S. 723 (1935).

<sup>105</sup>The Attorney General in 1918 (31 OPS. ATT'Y GEN. 198) advised the President that under the Lever Act he could requisition cottonseed cake to preserve the cattle herds of Texas and insure a proper meat supply for the country. The terms of the Lever Act relied upon were "public use connected with the common defense." Cf. 31 OPS. ATT'Y GEN. 344 (1918).

<sup>106</sup>New Zealand has passed a Small Farms Amendment Bill which gives the government power to take land for settlement to provide small farms for soldiers when the war ends. See (March, 1941) ROUND TABLE, 391-392.

<sup>107</sup>*United States v. 8677 Acres of Land*, 42 F. Supp. 91 (E. D. S. C. 1941). Accord-

In *Andrews v. Howell*,<sup>108</sup> it appeared that under the Australian National Security Act, which gave the government broad powers to prosecute the war, a pear and apple acquisition regulation was issued, which stated that its purpose was to minimize the effect of the disorganization of the market from inability to export those commodities because of lack of shipping facilities caused by the war. In December of 1940, the Minister ordered the acquisition of all apples and pears harvested between July 1, 1940 and July 1, 1941. The regulation also prohibited the moving of the fruit so acquired. Prosecution and conviction could be had for violation of the prohibition against moving. The defendant argued that a regulation of this sort was not within the defense powers of the government and violated section 51 of the Australian Constitution.<sup>109</sup> The court dismissed the appeal, and one of the judges stated that the course of war made it necessary to consider that the internal condition of the country had a substantial bearing upon the prosecution of the war.

*B. Use of Eminent Domain or the War Power to Take Property in Aid of Another Constitutional Power*<sup>109a</sup>

The eminent domain power, wherever appropriate, may be used in aid of any of the constitutional functions or powers of the government.<sup>110</sup> As argued in the preceding subsection, in time of war such aid may, in respect to the war effort, be quite broad. The question may arise, however, whether a right to take property may be implied where a statute confers a certain power upon the executive branch of the government without conferring in express terms the power to take property for such purpose. It is believed that the answer is

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ing to the government's brief in *Vogelstein & Co. v. United States*, 262 U. S. 337 (1923), at the request of businessmen, requisition was used to protect them from being sued for breach of contract. See *supra* p. 319.

<sup>108</sup>(1941) 15 AUST. L. J. 127.

<sup>109</sup>This section provided that Parliament, subject to the Constitution, has the power to make laws with respect to "The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws."

<sup>109a</sup>See *supra* pp. 318-319.

<sup>110</sup>Cf. Art. I, § 8, ¶¶ 1, 18 of the United States Constitution. See *Oklahoma v. Atkinson Co.*, 313 U. S. 508 (1941); *State of Minnesota v. United States*, 125 F. (2d) 636, 640 (C. C. A. 8th 1942); *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668, 681 (1896); *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, 530 (1894); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 656 (1890); *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 531 (1885); *Kohl v. United States*, 91 U. S. 367, 371 (1875); *C. M. Patten & Co. v. United States*, 61 F. (2d) 970, 972 (C. C. A. 9th 1932), *dismissed as moot*, 289 U. S. 705 (1933); *Burley v. United States*, 179 Fed. 1 (C. C. A. 9th 1910); *Alabama v. United States*, 38 F. (2d) 897 (1930), *rev'd on other grounds*, 282 U. S. 502 (1931); *New York City Housing Authority v. Muller*, 270 N. Y. 333, 341, 1 N. E. (2d) 153 (1938); *United States v. Tiffin*, 190 Fed. 279, 280 (N. D. Ohio 1911); *High Bridge Lumber Co. v. United States*, 69 Fed. 320, 325 (C. C. A. 6th 1895); *Rudacille v. State Commission*, 155 Va. 808, 821, 156 S. E. 829, 834 (1931); 16 OPS. ATT'Y GEN. 369, 371 (1879).

no, unless it is reasonably contemplated that the power granted could not be exercised adequately without resort to expropriation.<sup>111</sup>

Nevertheless, such lack of authority does not necessarily foreclose the acquisition of property. Other statutes may confer upon the President the power to acquire property for purposes broad enough to cover implementation of another power given to some agency or agencies of the government. In such event, he might acquire the property himself, have some agency act for another,<sup>112</sup> or whenever possible, delegate the power to the agency itself.<sup>113</sup> These devices may be and have been used by various agencies of the government—one agency without eminent domain power or funds asking another agency having such powers to exercise them in its behalf.<sup>114</sup> Such means of using one agency to acquire property for another may be legally justified under statutes which expressly provide for freedom of disposition on the part of the acquiring agency. Where the statute authorizing the acquisition of property does not authorize the acquiring agency to dispose of it, possibly the power of the President and that of executive agencies to transfer public property from one agency to another might allow ultimate acquisition or control of the property by the agency which never had the right to take property by eminent domain.<sup>115</sup> It could be argued that where a permitted power of expropriation is useless without a power of disposition, that power may be implied.<sup>116</sup> However, this backhanded method of supplying to agencies eminent domain or dispositive powers not given them by Congress, at times runs into practical difficulties, at times skirts along legal quicksands,<sup>117</sup> and

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<sup>111</sup>This does not mean that the President under his constitutional war powers, might not be found to have such authority. Justification probably would have to be found in an immediate and pressing necessity. The courts are not inclined to find a grant of the power by inference. See *United States v. Powers*, 70 Fed. 748 (S. D. Ga. 1895); 18 AM. JURIS. (Eminent Domain, § 26). See, however, *supra* p. 333.

<sup>112</sup>*Cf.* Ex. Order No. 9088, 7 Fed. Reg. 1775. Recommendation of the agency desiring the exercise of the power would probably set the power in motion. See Note, *Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 827.

<sup>113</sup>As provided for in the Second War Powers Act.

<sup>114</sup>It may be merely a matter of convenience which agency is to acquire the property. *Cf.* Ex. Orders Nos. 9121, 9160, 7 Fed. Reg. 2588, 3542.

<sup>115</sup>See *infra*.

<sup>116</sup>31 OPS. ATT'Y GEN. 198 (1918).

<sup>117</sup>During the first world war, the Price Fixing Committee considered that its foremost indirect weapon of enforcement, was the power to requisition goods or to place commandeering orders with plants or for supplies. The threat was to ask proper authorities to commandeer. It is said that the legal section of the War Industries Board prepared a memorandum that it was not duress to threaten to commandeer in this form: "These are the prices to which the government will agree. If you agree we will pay such prices, if not we will ask the proper authorities to commandeer it and you will get just compensation." See GARRETT, GOVERNMENT CONTROL OVER PRICES (1920) 235, and *cf.* *Lajoie v. Milliken*, 242 Mass. 508, 136 N. E. 419 (1922).

is hardly to be recommended as a method of carrying on governmental business.

It may be doubted that the power to expropriate property for war purposes could enable the executive branch of the government to enforce another statutory war power by using the expropriation power as a sanction, where the statute in question did not provide for any such sanction.<sup>117a</sup> On the other hand, its use incidentally as a sanction would seem permissible. Thus if the allocation program bogged down from an inability to compel individual obedience, complete control over the property which it was desired to allocate, with the power to determine distribution, might well be considered a war purpose for which property could be taken, even though incidentally it might operate as a sanction.

The broad terms of Title II of the Second War Powers Act<sup>118</sup> would seem to permit the taking of realty as a means of enforcing another necessary war power, but its use as a sanction would probably have to be under the guise of a compensable taking for the public use rather than a penal sanction, in the absence of a statutory authorization of such sanction. The Requisitioning Act of October 16, 1941, as amended by the Second War Powers Act,<sup>119</sup> may be so used in respect to personalty, but a more liberal construction would be required for such power to be found within its much narrower terms. The powers given the Reconstruction Finance Corporation furnish a further means of exercising the eminent domain power over personalty or realty to reinforce another war power.<sup>120</sup>

### C. Taking Property for Third Persons

As late as 1935, a federal Circuit Court of Appeals held that property could not be taken by the federal government for slum clearance and public housing purposes because it was not a "public use."<sup>121</sup> The case is probably not good law today,<sup>122</sup> and the Supreme Court has recognized that the concept of public use is an expanding one.<sup>123</sup> It is clear that public use does not

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<sup>117a</sup>Cf. Abels, *Price Control in War and Emergency* (1942) 90 U. OF PA. L. REV. 675, 688 *et seq.* *A fortiori*, where the statute forbids a taking, *supra* note 111. Cf. *United States v. Constantine*, 246 U. S. 287 (1935).

<sup>118</sup>See *supra* pp. 336-337.

<sup>119</sup>See *supra* pp. 337-338.

<sup>120</sup>See *supra* p. 341, n. 179a.

<sup>121</sup>*United States v. Certain Land in Louisville*, 78 F. (2d) 684 (C. C. A. 6th 1935), *cert. granted*, 296 U. S. 567 (1935), *dismissed on motion of government*, 297 U. S. 726 (1936).

<sup>122</sup>It stands practically alone. See Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 B. U. L. REV. 615.

<sup>123</sup>See *United States v. Irvin* (Sup. Ct. No. 658, 1942). Cf. Art. 24 of the Cuban Constitution of 1940 (property may be expropriated for reasons of public utility or social interest).



necessarily mean that the property taken must be used by the public.<sup>124</sup>

Where property has been taken under the war power for transfer to or use by a third person, the question has been raised whether this is a taking by the federal government for public use.<sup>125</sup> The answer to this question is that "The Government may acquire property for the use and occupation of another agent whether it be governmental or non-governmental in order to aid the national defense."<sup>126</sup> Modern warfare makes it necessary to exercise this power for the immediate benefit of third persons as the conduit through which the war effort may be facilitated, without regard to the nature of the conduit or whether the third person is a profit-making entity.<sup>127</sup> Moreover, the right to take property for the purpose of disposing of it to third parties has been recognized.<sup>128</sup> During the last war the government took property from citizens and turned it over to allied countries for use in the prosecution

<sup>124</sup>See Nichols, *op. cit. supra* note 122. Cf. *State of Minnesota v. United States*, 125 F. (2d) 636 (C. C. A. 8th 1942) (for Indians). In *International Congress of Local Authorities, Expropriation of Land* (Seville, 1928), it is said at 127:

"It is not absolutely necessary for admission of public use that the expropriated land should become public property. It is not indispensable that it become property of an enterprise serving the public and that everyone or even a considerable group of persons must be enabled to profit from it or to utilize it on equal conditions. It is not even indispensable that everybody or a considerable group of persons finding themselves in similar circumstances have an equal right to acquire the expropriated property in order to form a new private property. Public use exists whenever there is a utilization of land undoubtedly more desirable for the public good than utilization by a natural proprietor."

<sup>125</sup>In *Olympia Shipping Corp. v. United States*, 71 Ct. Cls. 251 (1930), *cert. denied*, 284 U. S. 680 (1932), the United States took over a ship during the world war and chartered it to the French Government. The court found it unnecessary to pass upon the question raised by the plaintiff that the Shipping Board had exceeded its authority in so doing.

<sup>126</sup>*United States v. 243.22 Acres of Land*, 43 F. Supp. 561 (E. D. N. J. 1941). In a condemnation suit instituted upon the request of the Secretary of War, the defendant attempted to prove that the Secretary of War had entered into an emergency plant and facilities contract with the American Airplane and Engine Corporation, that the land in question was being acquired to expand the latter's plant, and that the corporation was to finance the cost of the proceeding, land and facilities, but was to be reimbursed by the government with an option to buy the land. The court excluded such evidence since Pub. L. No. 703, 76th Cong., 3d sess., expressly provided that the Secretary of War could dispose of property acquired as he saw fit. Cf. *International Paper Co. v. United States*, 282 U. S. 399 (1931); *United States v. Forbes*, 259 Fed. 585 (W. D. Ala. 1919), *aff'd*, 268 Fed. 273 (C. C. A. 5th 1920); 33 OPS. ATT'Y GEN. 551 (1923). See *Highland v. Russell Car Co.*, 279 U. S. 253, 260 (1929).

<sup>127</sup>Cf. Ex. Order No. 9123, 7 Fed. Reg. 2642.

<sup>128</sup>*Brown v. United States*, 263 U. S. 78 (1923); *Old Dominion Land Co. v. United States*, 296 Fed. 20 (C. C. A. 4th 1924). It is a public use for the Government to dispose of its property to private entities where to do so would redound to the public benefit. *United States v. City of Springfield*, 22 F. Supp. 672 (D. Mass. 1938), *aff'd sub nom.*, *Springfield v. United States*, 99 F. (2d) 860 (C. C. A. 1st 1938), *cert. denied*, 306 U. S. 650 (1939); *State of Alabama v. United States*, 38 F. (2d) 897 (1930), *rev'd on other grounds*, 282 U. S. 582 (1931). And see *United States v. 243.22 Acres of Land*, *supra* note 126.

of that war. In this war, this sort of aid has been implemented by the Lend-Lease program. In a number of instances the War Production Board has requisitioned scrap metal which the Metals Reserve Corporation has paid for and in turn has sold to a dealer.<sup>129</sup>

The German Contributions Law<sup>130</sup> expressly provides that agencies, outside the Armed Forces, which are entitled to contributions, may demand contributions for third persons.

In England, statutes and defence regulations clearly permit such taking; to a limited extent this was permitted in peacetime.<sup>131</sup>

#### D. *Billeting*

1. *Billeting in the United States.*—To compel an occupant of property to lodge some stranger in time of war, is not a familiar concept to present-day Americans. But recently, billeting has been discussed seriously in connection with securing quarters for defense workers. During the last world war, 141 vacant houses were commandeered in Washington for billeting purposes in the three months prior to the Armistice.<sup>132</sup> These houses consisted of dwellings used only occasionally by wealthy persons; houses for sale but not for rent;<sup>133</sup>

<sup>129</sup>See Press Release, War Production Board, No. 751, March 31, 1942.

<sup>130</sup>See *supra* p. 484.

<sup>131</sup>*Cf.* questions and answers to a questionnaire filled out by the Standing Committee for England and Wales of The International Union of Local Authorities for the International Congress of Local Authorities:

#### II. Does the law recognize the right of local authorities to expropriate land?

1. For lines of communication. Yes.
2. For games, recreation, burial grounds. Yes.
3. For erection of public utility—schools, orphanages, slaughter houses. Yes—qualifiedly.
4. For the construction of public works in connection with gas, electricity, etc. Yes.
5. For private industries. No.
6. For cottage gardens. Yes.
7. For sanitary improvements. Yes.
8. For exchange with other land. Yes, for certain purposes.
9. Which should be built upon and upon which the owners fail to build within a given period. No.
10. Which should be altered or redistributed. No, except for clearance of unsanitary dwellings.
11. Which should constitute land held in reserve for the town. No, but see TOWN PLANNING, October 1925, § 8, as to purchase of reserve land by agreement.
12. For the construction of dwellinghouses. Yes.

(b) With reference to questions 5 and 12, to what extent may the town dispose of the lands expropriated, to private people and subject to what conditions? Not as to 5; as to 12, land expropriated to provide working class dwellings or to be cleared, or unsanitary dwellings may be sold or let to private individuals who will undertake to effect the purposes of the expropriation.

<sup>132</sup>Report of United States Housing Corporation of December 3, 1918 (Rept. of Committee on Requisitioning Houses in The District of Columbia).

<sup>133</sup>Those having new or newly renovated houses for sale were given a grace period in which to make a sale.

and houses in such bad condition that they could not be readily sold or rented. About 1300 war workers thus were housed.

The founders of the Constitution were familiar enough with the abuses of billeting to cause a provision concerning that practice to be inserted into the Constitution. The Third Amendment entirely forbids compulsory billeting of the armed forces in peacetime, and forbids such billeting in time of war unless provided by law. It is not clear whether "by law" means "by a statute of Congress"; probably this would be the reasonable construction.<sup>134</sup> It may be noted that modern war billeting needs are of a nature not covered by the terms of this Amendment. It would seem advisable for Congress to pass a statute on this subject before administrative officials feel compelled to do so without an Act of Congress. No act is known which expressly gives or denies this power to the executive branch of the government; however, it might be inferred.<sup>135</sup>

2. *Billeting elsewhere.*—In countries with large armies and more limited space than the United States, billeting has often been resorted to. Billeting in the United Kingdom has taken two forms. One has been the traditional statutory provisions for billeting of the armed forces.<sup>136</sup> The other and more novel form is compulsory billeting of defense workers and evacuees under the Defence Regulations.<sup>137</sup>

At the beginning of the war it was the policy of the English government to accommodate as many workers as possible in billets near factories. Local householders were visited by welfare or billeting officers, and their accom-

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<sup>134</sup>The power of Congress to provide for billeting is clear, not only from its express powers under the Constitution, but by negative implication from restrictions on billeting in the Third Amendment. Billeting might be possible under state laws such as the Emergency laws of Massachusetts passed in 1941 and 1942, see *supra* Pt. II, B, 9. If taking property to provide for defense housing is a public use, as it clearly is, [see *United States v. Stein*, 48 F. (2d) 626 (N. D. Ohio, 1931)], compulsory billeting for the armed forces, for defense workers, for evacuees, or for other war purposes, would seem immune from attack on the question of taking for public use.

<sup>135</sup>The process of rationalizing by inference could find such power in Title II of the Second War Powers Act, in statutes setting up an emergency fund for the President, and in the powers given to the Reconstruction Finance Corporation. Nevertheless, the nature of the subject-matter and the lack of any legislative standards might cause the courts to hesitate to find such an inference.

<sup>136</sup>*I.e.*, The Army Act, The Air Force Act, and The Naval Billeting Act. The billeting of vehicles, as well as horses, has been provided for. L. R. Statutes, 1939, c. 17. This Act has a schedule of charges which victualling houses may make for billeting.

<sup>137</sup>A third form of billeting might be considered to be the authorization given to local authorities to use private homes for public shelters to protect the public from war operations. Defence Regulations, Reg. No. 23. Authority for such action preceded the war. Civil Defence Act of 1939, 2 & 3 GEO. VI, c. 31. For civil defence purposes the Act authorizes the compulsory hiring of land; local authorities can post a notice in the building or a part thereof declaring that the building or a part of it may be required for use.

modations noted. They could appeal compulsory billeting to a tribunal.<sup>138</sup> For compulsory billeting the standard rate was five shillings and it was not required to give meals.<sup>139</sup> Recently, more drastic billeting regulations have been issued for billeting essential workers in designated areas. Persons living in necessary premises may be prohibited from sleeping therein or from using them for other purposes.<sup>140</sup> Under the Defence Regulations, billeting notices are to be delivered to the occupier, but if this is not practicable, to any person on the premises.<sup>141</sup> The occupier may be required to furnish "such accommodations by way of lodging or food or both, and either with or without attendance, as may be specified, in the notice for such persons as may be so specified." Where exclusive accommodation is needed, no prior occupant is entitled to occupy the room.<sup>142</sup> The Defence Regulations provide for determination of the price of billeting accommodations by the Minister of Health, and payment by him or some other authorized authority, with a right of recovery by the Minister from the person accommodated or the person liable for his maintenance.<sup>143</sup> Disobedience of a billeting notice may subject one to a criminal penalty.<sup>144</sup>

These billeting regulations are drastic enough to require extreme care in their administration. No one likes to be told he is a "parasite" and required to give up his own living accommodations. But war is a hard taskmaster. The German Contributions Law, however, imposes a billeting obligation which is less drastic than that of England.<sup>145</sup>

In Australia, ordinances which legalize billeting of Australian troops in private homes have been extended to include troops of allied nations.<sup>146</sup> A

<sup>138</sup>Provision was made for creation of billeting tribunals. See Defence Regulations, Gen. Reg. No. 22.

<sup>139</sup>See Note, *Housing for Britain's War Workers*, BULLETINS FROM BRITAIN, February 11, 1942.

<sup>140</sup>Defence Regulations, Gen. Reg. No. 22a, added to the Defence Regulations in March, 1942, by S. R. & O. No. 381.

<sup>141</sup>Defence Regulations, Gen. Reg. No. 22.

<sup>142</sup>*Ibid.* It is "the duty of the occupier of any premises in which accommodation for any child not accompanied by a person otherwise responsible for his care is so furnished . . . to care for the child to the best of the occupier's ability." Held applicable to 14 year old girl in *Murray v. Parkes* (1942) 86 Sol. J. 100.

<sup>143</sup>Defence Regulations, Gen. Reg. No. 22.

<sup>144</sup>In *Mee v. Toone* (1940) 84 Sol. J. 427, a criminal suit was sustained against an occupier for refusing to furnish two children with board and lodging pursuant to a billeting notice.

<sup>145</sup>See §§ 5 and 6. Section 5 provides that rooms and places are to be contributed to the extent that the person who grants them is not restricted in the use of the space indispensable for his own needs in regard to his home, commerce, profession, or handicraft. Whether these restrictions have been changed since 1939 when this law was amended, is not known.

<sup>146</sup>AUSTRALIA, January, 1942; (1942) 15 Aust. L. J. 258. National Security Reg. No. 78, provides also for billeting of persons in the service of a local governing authority and engaged in the performance of essential services.

Quarterming Order has been issued providing for the designation of quartering areas and of quartering and claims officers. In general, keepers of public houses, owners and occupiers of buildings other than churches and banks, and private householders may be required to furnish quarters. Payment is to be made at certain rates set out in a schedule appended to the order. The person providing quarters may recover for loss or damage occasioned during and by the occupancy. A quartering and claims officer may authorize payments up to a certain amount; over that amount, and up to a certain higher amount, claims go to a special board. Claims above the last-mentioned maximum are dealt with under the general National Security Regulations pertaining to compensation for damages.<sup>147</sup>

## VI. KINDS OF PROPERTY WHICH MAY BE TAKEN

Whether the eminent domain power may be exercised against all kinds of property has been a matter of dispute.<sup>148</sup> There are at least three major problems involved: (1) Can the nature of the property affect the power to take? (2) Can the nature of the holder affect the power to take? (3) To what extent is the taking limited, and what sort of interests in property may be taken?

### A. The Type of Property

Under this heading will be discussed only certain types of property, the taking of which has caused lawmakers and law writers some trouble. In the main, most property is taken without objection on the ground of the nature of the property.

1. *Industrial Plants*.—The taking of industrial plants, or rather the possibility of taking them, has aroused much controversy.<sup>149</sup> Despite the fact that plants clearly may be taken under the Second War Powers Act,<sup>150</sup> as well as under other statutes,<sup>151</sup> bills have been introduced recurrently for this purpose. The problem is an emotional one since it is tied up with the freedom of labor. Thus far the government has temporarily taken over a number of plants,<sup>152</sup> mainly because of labor trouble. Maintenance of labor service in

<sup>147</sup>See (1942) 15 AUST. L. J. 258. The order does not authorize housing of males in buildings occupied solely by women or by women and children.

<sup>148</sup>See Colvin, *Property Which Cannot Be Reached by the Power of Eminent Domain for a Public Use or Purpose* (1929) 78 U. OF PA. L. REV. 1, and FEDERAL EMINENT DOMAIN (Dep't of Justice, 1940).

<sup>149</sup>See Note, *Executive Commandeering of Strike-Bound Plants* (1941) 51 YALE L. J. 282.

<sup>150</sup>See *supra* pp. 335-337.

<sup>151</sup>See *supra* p. 338.

<sup>152</sup>See *supra* p. 327. In addition to those referred to in the first part of this article, three other plants were taken over under Exec. Order No. 9141, 7 Fed. Reg. 2961.

the plants taken over has not caused much trouble. There are probably several reasons for this amicable relationship. In the first place, the control by the government has been of comparatively short duration. Probably a better reason is that the present administration has gained the confidence of labor; also, the concept of Uncle Sam as a large scale employer is no longer novel. But if the need arises to freeze labor or managerial services, along with the expropriation of the physical plant, it is believed that the Constitution does not prevent the government from doing so in order to facilitate the prosecution of the war.<sup>153</sup>

2. *Money*.—Expropriation of money, in the United States, would have to surmount two constitutional hurdles. One is the Fifth Amendment with its requirement of payment of just compensation. The other is the constitutional prohibition against a direct tax without apportionment.<sup>154</sup> It has been thought that these obstacles are not insurmountable,<sup>155</sup> but views to the contrary have been expressed.<sup>156</sup>

The presence of the Fifth Amendment presents several major problems. One is whether other constitutional provisions, such as the power to regulate currency and the power to wage war, are to be read with the Fifth Amendment, or whether that amendment stands alone.<sup>157</sup> Another approach is to determine whether the Fifth Amendment permits payment in something other than money,<sup>158</sup> or whether delayed payment is possible.<sup>159</sup>

There seems to be no constitutional difficulty in expropriating foreign currency since it may properly be considered a commodity, the value of which may be determined by reference to its exchange value and made payable in domestic currency. Perhaps a similar rationale might justify the taking of gold coin and bullion, as long as its value was payable in currency used as a

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<sup>153</sup>See Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV. L. REV. 50.

<sup>154</sup>U. S. CONST. Art. 1, § 1, ¶ 3; Art. 1, § 9, ¶ 4.

<sup>155</sup>See West, *The Validity of Forced Loans in Time of War—A Consideration of S. 1650* (1940) 8 GEO. WASH. L. REV. 904.

<sup>156</sup>Cormack, *The Universal Draft and Constitutional Limitations* (1930) 3 SO. CALIF. L. REV. 361; Colvin, *Property Which Cannot Be Reached by the Power of Eminent Domain for a Public Use or Purpose* (1929) 78 U. OF PA. L. REV. 1.

<sup>157</sup>See arguments in *Ling Su Fan v. United States*, 218 U. S. 302 (1910). The court itself said at 310-311:

"Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequent of intrinsic value."

*Cf. Nortz v. United States*, 294 U. S. 317 (1935).

<sup>158</sup>See *infra* Pt. VII, F.

<sup>159</sup>See *infra* Pt. VII, G, 5.

standard medium of exchange.<sup>160</sup> Gold as an international medium of exchange may have a definite place in the prosecution of war.<sup>161</sup>

3. *Business Services.*—Compulsory orders placed by the government with individuals and firms to produce for or turn over to the government products customarily dealt in by them, were frequent in the last war, and have been used in this one. Backed by statutes imposing criminal sanctions for refusal, such orders, in effect, commandeer business services. The commandeering of such services appears to have the approval of the Supreme Court.<sup>162</sup> Where it is meant to requisition such services, it is advisable not to leave the requisition to inference.<sup>163</sup>

4. *Power to Direct or to Require Delivery.*—Under the war power it seems clear that the government could order the diversion of some product from one destination to another. Less clear, but strongly supportable, is its power to require delivery of the thing requisitioned.<sup>164</sup> This is illustrated when ships are requisitioned and the owner or master directed to bring the vessel to some port different from the one to which it was destined. During the last world war the fuel administration and the Director General of Railroads on many occasions ordered the diversion of coal shipments. The writer is unaware of any challenge made to such orders on the ground of lack of constitutional power, but such orders were frequently challenged on the ground that they were an exercise of eminent domain.<sup>165</sup> Delivery is commonly required under the Australian National Security Regulations.<sup>166</sup>

The law of eminent domain with its emphasis upon the taking of realty did not have to consider the problem of physical delivery. In the case of personality, a requirement of delivery ordinarily has been eschewed. If delivery is part of the customary service given an owner upon the sale of a commodity, it may be argued that this is a business service which may be commandeered along with the commodity. But where this element is lacking, it is believed that the power to compel delivery is not part of the eminent domain power

<sup>160</sup>Many of the members of the British Commonwealth have acquired or provided for the acquisition of foreign currency, especially that of the United States.

<sup>161</sup>*E.g.*, The New Zealand Emergency Regulations provide for the acquisition of gold coin and bullion.

<sup>162</sup>*Cf.* *Liggett & Myers Tobacco Co. v. United States*, 274 U. S. 215 (1927); *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1924); see *United States v. Bethlehem Steel Corp.* (Sup. Ct. Nos. 8 and 9, 1942).

<sup>163</sup>See *China Mutual Steam Nav. Co. v. MacLay* [1918] 1 K. B. 33 where the inference was denied.

<sup>164</sup>*Cf.* Order in *Penn Chemical Co. v. United States*, 63 Ct. Cls. 15 (1927) "... does hereby requisition. . . . Delivery of said supplies will be made as directed by the War Industries Board. . . ."

<sup>165</sup>See *infra* Pt. VII, G, 1.

<sup>166</sup>See *supra* p. 7.

and not included in a grant of power to take property for war purposes,<sup>167</sup> although it may be permissible under the war power or under Article I, § 8, ¶ 18 of the Constitution.

5. *Patents.*—It has been said that during the first World War, the Alien Property Custodian seized about 10,000 patents belonging to enemy aliens, and only a few of them were ever returned under the Winslow Act.<sup>168</sup> The number of claims filed for compensation, however, was substantial.<sup>169</sup> In some instances the United States appears to have used the inventions prior to seizure of the patents by the custodian, but generally, if not always, orders of seizure by their express terms included not only the patent but all claims for infringement thereof. Hence claims for past infringement by or for the United States were, as a war measure, seized with the patent by the custodian.<sup>170</sup> In the United States, the Alien Property Custodian has already seized several thousand patents.<sup>171</sup>

The problem of controlling patents, whether held by citizens or alien enemies, focuses upon several points. One is the compulsory secrecy which legislation, enacted in this country in 1940 and 1941, is designed to insure.<sup>172</sup> Another is the taking of the patent or use thereof. An Act of June 25, 1910,<sup>173</sup> permits officers of the United States to utilize patented inventions on behalf of the government; a subsequent enactment gives contractors with the government a similar power of expropriation.<sup>174</sup> Under a statute passed during the last world war, an owner of a patented invention is given a right to claim compensation when the invention has been "used or manufactured by or for the United States without license of the owner thereof or a lawful right to use or manufacture the same."<sup>175</sup> Of considerable importance in the taking or using of patented inventions is the assurance of freedom from infringement suits desired by private persons who have been allowed by the government to use such inventions in aid of the war effort. They appear to have this protection.<sup>176</sup>

<sup>167</sup>Cf. *China Mutual Steam Nav. Co. v. MacLay* [1918] 1 K. B. 33.

<sup>168</sup>See Holtzoff, *Enemy Patents in the United States* (1932) 26 AM. J. INT. L. 272, 273.

<sup>169</sup>*Ibid.*

<sup>170</sup>*Administrative Decision No. 1, War Claims Arbitrator* (1929) 23 AM. J. INT. L. 193, 197.

<sup>171</sup>See Press Release of Office of Alien Property Custodian, PM-3522, June 3, 1942.

<sup>172</sup>54 STAT. 710 (1940), 55 STAT. § 657 (1941), 35 U. S. C. §§ 42, 42f.

<sup>173</sup>36 STAT. 851, 35 U. S. C. § 68 (1910). The patentee may sue in the Court of Claims. This is an exercise of the eminent domain power. See *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U. S. 290 (1911).

<sup>174</sup>36 STAT. 851, 35 U. S. C. § 68 (1910).

<sup>175</sup>*Ibid.*; as to a right of compensation for use of unpatented invention, see 54 STAT. 710, 35 U. S. C. § 42 (1940).

<sup>176</sup>*Broome v. Hardie-Tynes Mfg. Co.*, 92 F. (2d) 886 (C. C. A. 5th 1937); *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862 (D. Mass. 1939).



Control of the sort referred to is general in belligerent countries.<sup>177</sup>

6. *Enemy Property*.—Consideration of the problem of alien enemy<sup>178</sup> property demands a much fuller treatment than can be accorded it in this article.<sup>179</sup> Only a few matters will be touched upon.

Under the present Trading with the Enemy Act<sup>180</sup> in this country,<sup>181</sup> and in England and other parts of the British Empire,<sup>182</sup> property of foreign nationals may be vested promptly in designated agencies by issuance of a vesting order.

In March, 1942, the President by Executive Order set up the Office of Alien Property Custodian, the head of which is Mr. Leo T. Crowley. It will have custody of \$7,000,000,000 of alien assets frozen in this country.<sup>183</sup> An Alien Property Custodian system has been announced to protect the interests of Japanese, German, and Italian aliens and citizens evacuated from the Pacific Coast. The Treasury has said that in respect to crop-growing land an attempt would be made to lease or sell the property, or to continue to give attention to the crops to prevent their loss.<sup>184</sup>

7. *Property Outside the United States*.—In view of the power of the federal government to expropriate private rights in property, it follows that if such rights exist in a place where the United States has such power, it may be exercised no matter where the property itself may be physically located. If the law of the situs does not prohibit, property in a foreign country may be effectively expropriated.<sup>185</sup> It is believed that under the law of nations,

<sup>177</sup>As to the United States, see Information Digest, April 21, 1942; as to England, Patents and Designs Act 1942; Defence (Patents, Trade Marks) Reg. No. 3 (1941); HAILSHAM, LAWS OF ENGLAND (1941 Supp., Patents) p. 11 and ¶ 1329. As to South Africa, see (1940) 3 COMP. L. SERIES 401.

<sup>178</sup>In respect to the last world war, it has been said that

"The test of liability to seizure was not the citizenship or nationality status of the owner, but rather the status of ownership with respect to possibilities of enemy control. The property of enemy aliens interned, of persons residing in enemy countries, or territory occupied by the enemy, regardless of citizenship, and of persons outside the United States doing business within enemy territory, was taken over."

HANDBOOK OF ECONOMIC AGENCIES OF THE WAR OF 1917, 21.

<sup>179</sup>The subject is discussed at length in Parry, *The Trading with the Enemy Act and the Definition of an Enemy* (1941) 4 MOD. L. REV. 160; Bender, *Practical Aspects of Foreign Property Control* (1941) 19 N. Y. U. L. Q. REV. 1. See EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE (Lands Division, Dep't of Justice, 1940) 72 *et seq.*

<sup>180</sup>Pub. L. No. 354, 77th Cong., 1st Sess., amending The Trading with the Enemy Act of 1917. A number of vesting orders have already been issued.

<sup>181</sup>See 7 Fed. Reg. 2678, 2922 (vesting orders).

<sup>182</sup>This is true in the colonies of Great Britain as well as the mother country itself.

<sup>183</sup>See Information Digest, March 11, 1942, p. 3.

<sup>184</sup>*Ibid.* The Federal Reserve Bank of San Francisco, along with several branch offices, has been designated to protect such alien property.

<sup>185</sup>*Cf.* Olympia Shipping Corp. v. United States, 71 Ct. Cls. 251 (1930), *cert. denied*, 284 U. S. 680 (1932) (a ship loading in Greece). The Shipping Board telegraphed owners in New York that the use of the ship is "hereby requisitioned" and that the Board would take possession of the vessel through the American Consul at Piraeus.

a nation could expropriate the property of its nationals anywhere, subject to treaty provisions and to the law of the place where the property is located.<sup>186</sup>

Furthermore, the United States could acquire lands in another country,<sup>187</sup> and conversely, permit a foreign country to acquire, by purchase or expropriation, land or other property here.<sup>188</sup> Such acquisition is not prevented by the fact that full sovereignty would not attach to the property acquired.<sup>189</sup> Acquisition of property in an allied country, or acquisition of property in a non-belligerent country for war purposes, if acquired with the consent of such country which considered the acquisition as a means of its own defense,<sup>190</sup> could hardly be considered a violation of international law.<sup>191</sup>

There have been a number of instances where nations have entered into agreements concerning the use of and jurisdiction over lands in another con-

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<sup>186</sup>As to movables, this position was taken by Senator King, 64 CONG. REC. 5283. It has been advanced as a theory to justify not paying for property taken from enemy aliens whose claims were abandoned by Germany in her post-war treaties, see Armstrong, *The Confiscation Myth* (1923) 9 A. B. A. J. 489.

<sup>187</sup>The acquisition of bases in British Colonies is an outstanding example. And cf. Reno, *The Power of the President to Acquire and Govern Territory* (1941) 9 GEO. WASH. L. REV. 251. See 5 MOORE'S DIGEST OF INTERNATIONAL LAW 212-213 (Sulu); Lindley, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* (1926) c. 25; (1940) 34 AM. J. INT. L. 680, *et seq.*

<sup>188</sup>Cf. Anderson v. Transandine Handelsmaatschappij, 28 N. Y. S. (2d) 547 (1941). A number of foreign countries own realty in this country, unofficially as well as officially. As to intangibles, the United States by treaty has permitted foreign countries to expropriate debts due citizens, the United States assuming the burden of paying for such expropriation. This was true of the claims arising from the acquisition of Florida by the United States, Meade v. United States, 76 U. S. 691 (1870). Compare the Act of November 10, 1803, 2 Stat. 247, making provision for payment of claims of citizens of the United States against France, assumed by the United States under a convention with France. For a similar arrangement with Great Britain in respect to world war claims, see Treaty Series No. 756. See also 38 OPS. ATT'Y GEN. 322 (1935). Cf. The Sapphire, 11 Wall. 164 (1870).

<sup>189</sup>Cf. 29 OPS. ATT'Y GEN. 269, 270-271 (1911), "It may be assumed that a sovereign state cannot acquire property anywhere without impressing it to some degree with its own attributes of sovereignty, from which a state cannot wholly divorce itself. But when property is acquired by one state in another state by virtue of a treaty, any sovereignty which may attach to the property so acquired is limited by the terms on which, and the purposes for which the property was acquired, and only displaces the plenary sovereignty of the dominant state to that limited extent. There seems to be nothing in reason or in law which prohibits such a situation. It occurs in, and is illustrated by, the cases in which the United States owns land in one of the States of the Union with cession by and consent of the State." Compare the position of the United States upon acquiring realty in a state without its consent, 38 OPS. ATT'Y GEN. 341 (1935). Cf. Treaty Series No. 655 [United States mission lands in Siam (Thailand) subject to eminent domain by Siam].

<sup>190</sup>It has been done. See Foreign Policy Bulletin, March 13, 1942. In Wilson, *Leased Territories* (1940) 34 AM. J. INT. L. 704, reference is made to the negotiation by the United States with Nicaragua in 1914 of a 99-year lease of Great Corn and Little Corn Islands, with a right to maintain a naval base on the Gulf of Fonseca.

<sup>191</sup>It is commonplace. For a very recent instance, see (1942) 6 DEP'T OF STATE BULL. 448. Cf. Procl. No. 2536, 7 Fed. Reg. 301.

tracting nation,<sup>192</sup> and the United States has had the states<sup>193</sup> and other nations<sup>194</sup> acquire property within their boundaries for the use of the federal government.

8. *Scrap*.—Since the outbreak of the war a good bit of "scrap" has been requisitioned in this country. As to some of this scrap the articles taken are substantially unusable in their condition at the time they are taken. An interesting question might arise as to whether idleness, either voluntary or forced, could make otherwise useful property scrap for purposes of a requisitioning order issued to acquire "scrap."

Although the British Government is anxious to acquire scrap,<sup>195</sup> the Minister of Works has asserted that there is no intention to take as scrap valuable machinery and plants which must be preserved for use after the war. This machinery and the plants closed down under concentration schemes approved by the Board of Trade will not be requisitioned.<sup>196</sup>

9. *Intangible Property*.—In this and in the last world war contract rights have been taken by the government, and it is clear that such rights may be requisitioned or condemned.<sup>197</sup> Under the war power of the government, the fact that the promisor's promise involves personal services would not necessarily prevent the taking from being effective,<sup>198</sup> and the contract rights taken may be such as exist between third persons,<sup>199</sup> or between the government and a third person.<sup>200</sup>

<sup>192</sup>See 4 MALLOY, *TREATIES*, 4261 *et seq.* LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* (1926) c. 25. Some instances in which the United States was a party to such an arrangement: with Great Britain as to North Borneo; with Panama as to Panama. The agreements with Panama were extraordinary in that they allowed the United States to expropriate property within the jurisdiction of Panama, when such expropriation should be necessary for the Canal, 33 Stat. 2234 (1905). This right was abrogated by a recent treaty, 53 Stat. 1807 (1939).

<sup>193</sup>At one time it was common for the government to condemn land in state tribunals, and there is at least one such reported instance arising out of the last world war. See Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 B. U. L. REV. 631, 639 *et seq.*

<sup>194</sup>*E.g.*, Treaty Series No. 757 (France to acquire sites for monuments to be erected in France by the American Battle Monument Commission).

<sup>195</sup>See (1942) 86 SOL. J. 38; Reg. 56aaa (power to require information in respect to scrap). Subject to exceptions made in the order, scrap is defined to include metal which is or forms part of anything disused, obsolete, redundant, or is spare or otherwise serves no immediate purpose.

<sup>196</sup>See (1940) 86 SOL. J. 39. Returns of information from such firms are not required.

<sup>197</sup>*S. S. Corp. v. United States*, 73 Ct. Cls. 18 (1932). *DeLuca v. United States*, 84 Ct. Cls. 217 (1936). An order to furnish commodities is an exercise of eminent domain, *Liggett & Myers v. United States*, 274 U. S. 215 (1925).

<sup>198</sup>See order in *Consortio Veneziano v. United States*, 64 Ct. Cls. 11 (1927).

<sup>199</sup>*Brooks-Scanlon Corp. v. United States*, 265 U. S. 106 (1924); *De Laval Steam Turbine Co. v. United States*, 284 U. S. 61 (1931).

<sup>200</sup>*Nortz v. United States*, 294 U. S. 317 (1935).

There seems no reason why things not *in esse* could not be requisitioned, nor why the requisition could not be conditioned upon the existence of certain factors at the time when title or possession or control is to take place. Thus a future crop or future business services might be taken far enough in advance to insure a farmer or a business man of an outlet for his product and to enable him to plan therefor.

### B. *The Nature of the Possessor*

1. *Courts.*—By statutes or by international law, domestic courts may be given exclusive jurisdiction over certain property, including its disposition. Assuming the continued existence of such laws in time of war, do they prevent the executive branch of the government from taking such property by eminent domain or under the war power? In view of the sovereign nature of the power to take property for war purposes and the necessity of leaving to administrative determination the time and the extent of the taking, as well as the disposition of the property taken, it is believed that the powers of the courts in such cases is subject to the exercise of the war power or the eminent domain power.<sup>201</sup> Where this question arises, probably the courts will co-operate with the executive branch of the government, while at the same time endeavoring to retain vestigial elements of control not inconsistent with the exercise of the power to take property.<sup>202</sup> Requisition by the government will not require an abandonment of forfeiture proceedings by the government.<sup>203</sup> In England, it has been held that a belligerent power has the right under international law to requisition vessels or goods in the custody of its Prize Court.<sup>204</sup>

2. *The Sovereign.*—The fact that an interest in property has been acquired by the sovereign, by purchase or by eminent domain, will not prevent an exercise of the power of eminent domain to take a greater interest.<sup>205</sup> Where the administrative officials are empowered to dispose of property, as well as to take property, it would seem that they could take a lesser interest than the one originally acquired.<sup>206</sup> But questions of liability and just compensation

<sup>201</sup>*Cf.* International Harvester Co. v. United States, 72 Ct. Cls. 707 (1931); The Pietro Campanella, 41 F. Supp. 656 (D. Md. 1941).

<sup>202</sup>*E.g., Ex parte Whitney Steamboat Co.*, 249 U. S. 115 (1914); The Villarperosa, 43 F. Supp. 140 (E. D. N. Y. 1942). The United States had requisitioned the vessels after having brought forfeiture proceedings.

<sup>203</sup>The Villarperosa, 43 F. Supp. 140 (E. D. N. Y. 1942). *Cf.* The Pietro Campanella, 41 F. Supp. 656 (D. Md. 1941).

<sup>204</sup>The Zamora [1916] 2 A. C. 77. The court said this right was subject to several conditions such as determination of necessity by the court.

<sup>205</sup>This occurs occasionally when a leasehold interest has been taken and it is desired to take a fee.

<sup>206</sup>*Cf.* Russell v. United States, 261 U. S. 514 (1923) (cancellation of a government contract).

may effectively prevent the taking of a lesser interest and may be troublesome factors when a greater interest is taken.<sup>207</sup>

Congress has often authorized the President to make use of public lands for war purposes or to transfer their use from one government agency to another.<sup>208</sup> Even without such express authority the President has exercised this power, and although his Attorneys General have blown hot and cold on this question, the latest pronouncements of the Attorneys General<sup>209</sup> and of the Supreme Court<sup>210</sup> appear to furnish ample support for its exercise. A good deal of public land has been made available for war purposes.<sup>211</sup> In the spring of 1941, the Secretary of the Interior announced that more than 8,100,000 acres of public lands have been taken for military and naval purposes.<sup>212</sup> Transfers of personal property also have been made.<sup>213</sup>

Not without considerable protest on the part of the states, it has become settled that the eminent domain power of the Federal Government extends to property of a state,<sup>214</sup> and this power in administrative officials may be found in a general authorization by Congress of the exercise of eminent domain.<sup>215</sup> No police regulation of a state or a political unit may prevent the exercise of the federal eminent domain power for a purpose inconsistent with the regulation.<sup>216</sup> However, the mere taking and use of realty by eminent

<sup>207</sup>*Cf.* *United States v. 5 Acres of Land in Suffolk County* [D. Mass. (1942) unreported].

<sup>208</sup>*E.g.*, 34 U. S. C. § 523. *Cf.* 16 U. S. C. § 473; *cf.* 41 Stat. 130 (interchange of property between Army and Navy).

<sup>209</sup>38 Ops. ATT'Y GEN. 293 (1935). *Cf.* 40 Ops. ATT'Y GEN. No. 20, June 4, 1941.

<sup>210</sup>*The Sioux Tribe of Indians v. United States* (Sup. Ct. No. 798, May 11, 1942); *United States v. Midwest Continental Co.*, 236 U. S. 459 (1914).

<sup>211</sup>*E.g.*, Ex. Order 2646; Ex. Order 8337, 5 Fed. Reg. 594; Ex. Order No. 8616, 5 Fed. Reg. 5215 (Palmyra Island); Ex. Order 8821, 5 Fed. Reg. 3529.

<sup>212</sup>See (March 4, 1941) 2 DEFENSE 13. By Executive Order No. 9029, January 20, 1942, 7 Fed. Reg. 443, January 22, 1942, the President withdrew public lands in New Mexico for the use of the War Department as a general bombing range. The order recites that the areas described, including both public and non-public lands, aggregate, 1,249,904.36 acres.

<sup>213</sup>Ex. Order 8798, 6 Fed. Reg. 3049 (ships). *Cf.* Ex. Order 9088, 7 Fed. Reg. 1775-7; Ex. Order 9133, 9114, 9121, 9160.

<sup>214</sup>*Oklahoma v. Atkinson Co.*, 313 U. S. 508 (1941); *United States v. Wayne County*, 252 U. S. 584 (1920), *affirming*, 53 Ct. Cls. 417 (1918); *State of Minnesota v. United States*, 125 F. (2d) 636 (C. C. A. 8th 1942); *United States v. 40 Acres of Land in Jefferson County*, 24 F. Supp. 390 (D. Idaho, 1938). This power is exercisable through condemnation proceedings brought in a district court. See *State of Minnesota v. United States*, *supra*.

<sup>215</sup>*United States v. 60 Acres of Land in Williamson County*, 28 F. Supp. 368 (E. D. Ill. 1939). As to the extent of such implication, see *FEDERAL EMINENT DOMAIN* (Dep't of Justice, 1940) 14-15.

<sup>216</sup>*Cf.* *Arizona v. California*, 283 U. S. 423, 451 (1931); *Hunt v. United States*, 278 U. S. 96 (1928); *State of Minnesota v. United States*, *supra* note 214. See (1941) 23 PUBLIC MANAGEMENT 369.

domain does not carry with it exclusive jurisdiction over the place condemned.<sup>217</sup>

The power also may be exercised against the property of another country.<sup>218</sup>

### C. *The Extent of the Taking*

1. *Title versus Use and Possession.*—As already mentioned, it has been customary in this country to take title rather than use and possession of property. Certain kinds of property and certain specific purposes for which property may be desired might justify the taking of a temporary use rather than a permanent interest in the nature of a fee. In the case of ships it is generally the use (charter) of the ship which is taken rather than the title.<sup>219</sup>

Expropriation acts rarely attempt to put the former owner in a preferred position as to the reacquisition of land or other property when no longer needed by the government. The Requisitioning Act of October, 1941, prior to its amendment by the Second War Powers Act, was exceptional in so providing. In England, a few peacetime statutes have established such a preference.<sup>220</sup>

There are a number of reasons, however, why it is often advisable to take a greater interest in the property than is actually needed. Generally it is fairer to the person from whom the property is taken. If a fee is taken he gets paid and knows where he stands. If a lesser interest is taken he is still bound to the property and usually does not receive enough to try a new venture.<sup>221</sup> Moreover, in litigation, the government stands the risk that the value of the temporary use will be fixed at a sum approaching its fee value. Furthermore, if the property is injured or altered during the government's possession, the government may be in the dubious position of paying for possession plus a fee, instead of merely for a fee.<sup>221a</sup>

While a number of authorizing statutes specify the interest the United States should acquire, others do not. In the latter event it would seem that

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<sup>217</sup>See Laurent, *Federal Areas within the Exterior Boundaries of the States* (1942) 17 TENN. L. REV. 328.

<sup>218</sup>See Information Digest, April 29, 1942, p. 607; (1940) 3 DEP'T OF STATE BULL. 338.

<sup>219</sup>During the world war title to realty was taken by the War Department in the amount of \$16,697,000; use and occupation in the amount of \$3,146,000 per annum. Title to personalty was taken in the amount of \$125,990,000; use and occupation (ships) in the amount of \$126,047,000. See GARRETT, *GOVERNMENT CONTROL OF PRICES* (1920) p. 364 *et seq.*

<sup>220</sup>See *Report Prepared on Behalf of the Standing Committee for England and Wales of the International Union of Local Authorities*, International Congress of Local Authorities (Seville, 1928).

<sup>221</sup>Of course, he may prefer to be paid for the use and occupation and still retain his reversion.

<sup>221a</sup>See FIRST REPORT OF THE DEFENCE OF THE REALM LOSSES ROYAL COMMISSION (London, 1915) p. 5. Cf. *Hamburg-American Co. v. United States*, 277 U. S. 138 (1928); *Hamburg-American Co. v. United States*, 74 Ct. Cls. 360 (1934).

the extent of the interest to be taken should be left to administrative discretion.<sup>222</sup> It is for the Secretary of War or other officer authorized to acquire property to determine what, when, and how much property is to be acquired, and not the courts.<sup>223</sup> It is not necessary to have prior negotiations even though state law should so require.<sup>224</sup>

Where there is a taking without condemnation proceedings, and without specification of the interest taken, in suits for just compensation it has been said that "such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking."<sup>225</sup> It may be doubted whether such a rule would be strictly invoked in a case where (1) the power to take a greater or lesser interest than the above standard existed; where (2) at the time of the suit it would not be detrimental to the government to have an interest different from that necessary to effectuate the purpose desired at the time of the taking; and where (3) the equities of the claimant called for a different interest to be found than that fixed by the quoted language.<sup>226</sup> To avoid such a situation, the government needs to be careful to specify in its petitions for condemnation and in its requisitions the nature of the interest taken.

The Declaration of Taking Act provides for the taking of any land or easement or right of way in land.<sup>227</sup> Over a long period of time this Act has been administratively construed to include the right to take less than a fee, and many condemnation suits have proceeded on this basis. This construction is in line with the recognized view that a taking of less than a fee is compensable, and that it is within administrative discretion to determine the extent of the taking.<sup>228</sup> Leasehold interests, qualified fees, and easements<sup>229</sup> have frequently been condemned, and while the taking of title is common, the taking of a lesser interest is not uncommon.<sup>230</sup>

<sup>222</sup>Cf. *Oakland Club v. South Carolina Public Service Authority*, 30 F. Supp. (E. D. S. C. 1939), *aff'd*, 110 F. (2d) 84 (C. C. A. 4th 1940); *United States v. Forbes*, 259 Fed. 585 (N. D. Ala. 1919), *aff'd sub nom.*, *Forbes v. United States*, 268 Fed. 273 (C. C. A. 5th 1920); *United States v. Certain Lands in Town of Narragansett*, 145 Fed. 654 (D. R. I. 1906). But a number of cases hold that under such circumstances only that interest can be taken which is necessary to accomplish the desired purpose. *E.g.*, *Thomison v. Hillcrest Athletic Ass'n*, 39 Del. 590, 5 A. (2d) 236 (1939). Most of such cases do not have the government as a taker.

<sup>223</sup>*United States v. 243.22 Acres of Land*, 43 F. Supp. 561 (E. D. N. Y. 1942).

<sup>224</sup>*Ibid.*

<sup>225</sup>See *United States v. Lynah*, 188 U. S. 445 (1903).

<sup>226</sup>If the interest desired is not expressed by the administrative officer making the taking it is difficult to ask the court to seek his intention.

<sup>227</sup>46 STAT. 1421, 40 U. S. C. § 258a (1931).

<sup>228</sup>See *supra* p. 35; *Duckett & Co. v. United States*, 266 U. S. 149 (1924).

<sup>229</sup>Flowage easements are almost always taken in connection with river and harbor projects.

<sup>230</sup>Strangely enough, at least one senator thought that Title II of the Second War

The acquiring agency, in the absence of statutory limitation or a finding by a court of an abuse of discretion under the authorizing statute, is free to choose as much of the property as it thinks desirable. Good sense and the probability of severance damages<sup>231</sup> will be the only deterrents. In some countries an option is given the owner to compel a more complete taking in certain circumstances.<sup>232</sup>

In *Hawaiian Gas Products v. Commissioner of Internal Revenue*,<sup>233</sup> the court held that condemnation proceedings amounted to a sale of property within Section 117(d) of the Revenue Act of 1936 and loss was deductible only to extent of \$2000. One of the grounds of its decision was that the "sovereign can get no greater title than that held by the former owner." This statement seems clearly wrong.<sup>234</sup> The sovereign takes the interest it desires to take. If the owner has a mortgage or a tax lien or a doubtful title, the sovereign can and does take a fee simple absolute, free and clear of all encumbrances.<sup>235</sup>

## VII. THE RIGHT TO AND THE MEASURE OF COMPENSATION<sup>235a</sup>

### A. *The Right or Privilege*

Statements have been made and some authorities exist to the effect that compensation is not an element of the power of eminent domain, but merely a restriction upon that power, imposed by the constitution or other fundamental law of a state. But the view that the duty to compensate is an incident of the power has much support.<sup>236</sup> It has been suggested that only the doctrine of immunity of the state prevented early writers from finding a legally enforceable right to compensation, rather than the moral right which they

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Powers Act covered only the taking of title, and not a temporary interest. See 88 CONG. REC. 656-657 (1942). Representative Springer thought this bill was a departure from past enactments because he thought that previously the government always had condemned a fee title, 88 CONG. REC. 1703 (1942).

<sup>231</sup>See *infra* p. 525.

<sup>232</sup>See Land Acquisition Law of Jamaica (1940) § 11. Another section provides that § 11 shall not interfere with the Governor's power to take possession in cases of urgency. 233126 F. (2d) 4 (C. C. A. 9th 1942).

<sup>234</sup>For an illuminating analysis of this point, see Lenhoff, *Development of the Concept of Eminent Domain* (1942) 42 COL. L. REV. 596, 601 *et seq.*

<sup>235</sup>Expressly provided for in the British Defence Regulations (10th ed.) Reg. No. 53, and in the Netherlands Expropriation Law, Art. 73. See Lenhoff, *supra* note 234. *United States v. Dunnington*, 146 U. S. 338, 352-353 (1914).

<sup>235a</sup>Although this section of the article uses, in good part, the language of eminent domain indiscriminately, most of the cases cited arose out of war measures.

<sup>236</sup>Authorities pro and con are collected in FEDERAL EMINENT DOMAIN (Dep't of Justice, 1940) 96, §§ 18 and 19. Lenhoff, *Development of the Concept of Eminent Domain* (1942) 42 COL. L. REV. 594, points out that the early natural law writers did not contemplate that this power would be delegated by a state to a non-immune entity.



did find.<sup>237</sup> History makes it clear that whatever the soundness of this doctrine of immunity may be, compensation has been a normal incident, if not an element, of the exercise of the power to take property for public use.<sup>238</sup> This power has had a history dating at least as far back as Greece. Its manifestations from that time on in Rome, the Netherlands, France, England, and elsewhere have included the payment of compensation.<sup>239</sup> The constitutions of many countries expressly provide for compensation to be paid for expropriation of property.<sup>240</sup> In a few countries, however, this constitutional provision is made subject to the power of the government to pass laws to the contrary.<sup>241</sup>

In a few countries the concept of inviolability of property rights has been impaired by a countervailing thesis that property rights for some purposes are held in subordination to the general welfare.<sup>242</sup> It has been said that in England the Crown, in a war emergency, may take property without compensation.<sup>243</sup> But, in a case arising out of the last world war, when the

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<sup>237</sup>Lenhoff, *supra* note 236.

<sup>238</sup>SCOTT AND HILDESLEY, *THE CASE OF REQUISITION* (Oxford, 1920) 293, relates that during the Napoleonic Wars, certain gateways along the coasts were stopped to prevent a threatened invasion. These gateways had been used by farmers to draw up sea weed from the beach. When the threat of invasion had ceased, it was decided to pay compensation for loss suffered by farmers who had been unable to draw sea weed from the beach.

<sup>239</sup>See FIRST REPORT OF THE DEFENCE OF THE REALM LOSSES ROYAL COMMISSION (London, 1915). Cf. Jones, *Expropriation in Roman Law* (1929) 45 L. Q. REV. 512.

<sup>240</sup>MARIN, *EXPROPRIATION FOR PUBLIC USE IN THE DIFFERENT COUNTRIES*, International Congress of Local Authorities, *Expropriation of Land* (Seville 1928) mentions Argentina, Cuba, Chile, Mexico, Peru, Spain, Czechoslovakia, Finland, Poland, and Serbia. The Cuban Constitution of 1940, Art. 24, is even stronger on this point than at the time Marin wrote. Australia and the Netherlands may be added to this list.

<sup>241</sup>Art. 153 of the Weimar Constitution of 1919 provides: "Expropriation can be had only for the common welfare and upon statutory grounds. It is had with adequate compensation, insofar as an Imperial statute does not otherwise provide. Expropriation by the Empire as against lands, communes and associations serving the public can be had only with compensation." In 1933, the Nazi law of that year relating to communists gave the government the express power to issue decrees in contravention of certain articles of the Constitution, including Article 153. Article 26 of the German Contributions Law of 1938, as amended in 1939, contains a number of interesting provisions for indemnification and compensation but paragraph (1) provides: "A claim for indemnification does not exist; (a) if the contribution can reasonably be demanded without compensation." Czechoslovakia was said to have had a constitutional provision similar to that of the German Constitution, MARIN, *supra* note 240. Article 153 of the Netherlands Constitution provides: "When the common weal requires that property be destroyed or rendered useless, temporarily or permanently, this can only be done against compensation unless the law stipulates to the contrary." The Netherlands Information Bureau has informed the writer that compensation is uniformly required. It would seem, therefore, that this provision merely permits a taking prior to the payment of compensation.

<sup>242</sup>MARIN, *supra* note 240.

<sup>243</sup>*Report Prepared on Behalf of the Standing Committee for England and Wales of the International Union of Local Authorities*, International Congress of Local Authori-

Crown asserted such a right, the highest court of England held that where a statute authorized expropriation with compensation, the King's prerogative could not be exercised to take property even for war purposes without compensation.<sup>244</sup> There is a practically unbroken series of precedents to show that compensation has been incident to a taking for war purposes, whether under the King's prerogative or under statute.<sup>245</sup> "It may therefore be taken as a cardinal rule of the law of expropriation that compensation must be paid to the owner from whom the land is taken."<sup>246</sup> In the United States the Fifth Amendment expresses the same principle, but even without a proviso for the payment of just compensation, it would seem that payment of compensation would be a due process or natural law requirement<sup>247</sup> in view of the almost universal recognition of an obligation to make compensation.

### B. Justification

The argument for payment of compensation generally points out that if compensation were not made, the individual whose property was taken would be compelled to contribute a disproportionate share to the common weal. If he receives compensation he pays taxes thereon<sup>248</sup> and bears the same burden as other taxpayers and citizens, but he is not singled out as the "goat." The burden of public improvement or public purpose is transferred from his shoulders to the tax-paying public at large of which he is a member.<sup>249</sup> But this rationale would lead to the proposition that a general requisition of all automobiles or all clocks might be made without compensation, since almost all taxpayers would be directly affected and the owner receiving payment would, theoretically, find himself paying out a sum for someone else's automobile or clock approximating what he had received.<sup>250</sup> Whether the Fifth Amendment would permit such a taking without just compensation may be doubted, but whether just compensation could be made in the form of being

ties (Seville, 1928). Other statements to the same effect are collected in Cormack, *The Universal Draft and Constitutional Limitations* (1930) 3 So. CALIF. L. REV. 361, n. 71. See also, McNulty, *The Power of "Compulsory Purchase" under the Law of England* (1912) 21 YALE L. J. 639.

<sup>244</sup>See *Attorney General v. De Keyser's Royal Hotel, Ltd.* [1920] A. C. 508. *Accord*, *Bradley v. The King* [1940] 4 D. L. R. 49.

<sup>245</sup>See *SCOTT v. HILDESLEY, THE CASE OF REQUISITION* (Oxford, 1920).

<sup>246</sup>See *supra* note 243. See *People v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912).

<sup>247</sup>See *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 324-325 (1893). See Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1930) 6 WIS. L. REV. 67. See NEW YORK STATE CONSTITUTIONAL CONVENTION (1938) vol. 6, *Problems Relating to Bill of Rights and General Welfare*, 106 *et seq.* But this view has not been universal, see *State v. Dawson*, 3 Hill 100 (S. C. 1835). See *supra* note 236.

<sup>248</sup>See *Comm'r of Internal Revenue v. Kieselbach*, 10 U. S. L. WEEK 2677 (C. C. A. 3d 1942).

<sup>249</sup>See *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 602 (1935).

<sup>250</sup>The more general the requisition, the more it would look like a tax.

relieved of the tax burden otherwise necessary to pay for the automobiles or clocks taken from others is not so easily answered.<sup>251</sup>

Another pragmatic reason for the requirement of compensation is the protection it is supposed to afford against irresponsible activities of the executive or legislative branches of the government. It is not by accident that provisions for compensation are found in the basic laws of so many countries, rather than left to the will of the legislator or the executive.

### C. *The War Power and the Fifth Amendment*

Can property be taken in time of war for war purposes without payment of compensation? The courts in this country have never been confronted with the situation where reasonable men would agree that it was absolutely necessary for the prosecution of the war that property be taken without an obligation to pay compensation. If this unlikely case were to arise, this writer does not believe that the Supreme Court would allow the Fifth Amendment to bar the way.<sup>252</sup>

But this does not mean that the government can validly assert that by virtue of its war powers it may take property without just compensation. The Supreme Court in a number of decisions has held that the Fifth Amendment was applicable to wartime expropriations,<sup>253</sup> and it appears to be a generally accepted principle in this and other countries that wartime takings are compensable.<sup>254</sup> Whether acts which would constitute a "taking" in time of peace will necessarily be a "taking" in time of war has been left in some doubt by the Supreme Court.<sup>255</sup>

It may be doubted whether just compensation can be considered an unvarying concept. Aside from variations in the views of individuals, such as juries and judges, as to what is just compensation for the same piece of property, there may be a change in the conception of what is just compensation according to the year in which the expropriation takes place. It is believed that there is no immutable principle of law which prevents the courts from sanctioning this change of conception.<sup>256</sup> Therefore, although just

<sup>251</sup>See *infra* p. 514.

<sup>252</sup>See *Legal Tender Cases*, 12 Wall. 457, 541 (1870); *EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE* (Lands Division, Dep't of Justice, 1940) 89-90.

<sup>253</sup>*United States v. New River Collieries*, 262 U. S. 341 (1923). See *United States v. McIntosh*, 2 F. Supp. 244 (E. D. Va. 1932).

<sup>254</sup>In respect to this war it has been observed that the laws of the following foreign countries have provided for compensation where property is expropriated for war purposes: Belgium, British Commonwealth, France, Greece, Germany, Italy, and the Netherlands. In all probability, more could be added to this list. Cf. Official decree of the Reichskommissar requisitioning blankets in occupied Norway, *Inter-Allied Review*, November 15, 1941.

<sup>255</sup>See *Portsmouth Co. v. United States*, 260 U. S. 327 (1923).

<sup>256</sup>See *Matter of City of New York*, 284 N. Y. 48, 29 N. E. (2d) 465 (1940)

compensation must be paid for a wartime taking, it does not follow that the standards of value existing in times of peace must be followed in times of war.<sup>257</sup>

#### D. *The Right to Sue and Recover*

A number of state courts have held that constitutional provisions similar to the Fifth Amendment are self-executing, and that the doctrine of immunity of the sovereign from suit is not a good defense.<sup>258</sup> The Supreme Court, however, has never taken a similar position in regard to the federal government.<sup>259</sup> In view of the Fifth Amendment, however, it is clear that the fact that an expropriation statute does not expressly provide for compensation is immaterial so far as the right to recover compensation is concerned.<sup>260</sup> Property may be taken without prior payment where the "public faith and credit" of the government is pledged,<sup>261</sup> and such pledge exists, it is believed, where Congress authorizes a taking even though there has been no appropriation.<sup>262</sup>

Despite the fact that in a condemnation suit the right to compensation is never thought of except as one based upon the constitution, the Supreme Court has permitted considerable confusion to creep in as to the basis of the right to compensation where there has been a requisition. In Tucker Act suits, even though the Tucker Act expressly permits suits against the United States based upon a constitutional right, on a number of occasions, the Supreme Court has talked as if the right to just compensation was based upon another proviso of the Tucker Act—recovery upon a theory of implied contract.<sup>263</sup> On occasion the Supreme Court has preferred to rest the right

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(reduction, in the depression era, of interest rate to be paid in eminent domain proceedings).

<sup>257</sup>Ordinarily it will be followed because of the difficulty of determining what other standards to use, and the absence of any general recognition of a popular change in value concepts. Limitation of wartime profits might test this proposition.

<sup>258</sup>*Rose v. State*, — Cal. —, 123 P. (2d) 505 (1942) and cases cited therein.

<sup>259</sup>*Cf. Langford v. United States*, 101 U. S. 341 (1879).

<sup>260</sup>*In re Rugheimer*, 36 Fed. 369 (E. D. S. C. 1888); *Hamburg-American Can Co.*, 74 Ct. Cls. 360 (1934). *Cf. Shoshone Tribe v. United States*, 299 U. S. 476 (1937). For a similar rule in England, see *Bradley v. The King* [1940] 4 D. L. R. 49.

<sup>261</sup>*United States v. McIntosh*, 2 F. Supp. 244 (E. D. Va. 1932).

<sup>262</sup>When the Second War Powers Act (Pub. L. No. 507, 77th Cong., 2d Sess.) was being debated in the Senate, Senator Taft raised this question. No one was willing to answer in the negative and there was a general feeling that the President could be relied upon to act properly, 88 Cong. Rec. 691 (1942).

<sup>263</sup>*United States v. North American T. & T. Co.*, 253 U. S. 330 (1920); *United States v. Buffalo Pitts Co.*, 234 U. S. 228 (1916); see *Klebe v. United States*, 263 U. S. 188, 191 (1923); *Tempel v. United States*, 248 U. S. 121, 129 (1918). See Lenhoff, *Development of the Concept of Eminent Domain* (1942) 42 Col. L. Rev. 596, 608 *et seq.* A theory of this sort led to strange results as to the right to interest, see *International Harvester Co. v. United States*, 72 Ct. Cls. 707 (1931), decided prior to the *Jacobs* case, *infra* note 264.

of recovery upon the constitution,<sup>264</sup> and this seems much the better view.<sup>265</sup>

*E. Who Determines the Measure of Compensation*

In the United States, the Courts have insisted that the determination of the measure of compensation is a function of the judiciary.<sup>266</sup> What is meant, however, is that if a claimant so desires he may have this question decided by the courts. A legislative practice, inspired in the last and followed in this world war, where a taking has been had without condemnation proceedings, is to have the amount of compensation determined by administrative officials, with a right to accept part of the amount offered and sue for whatever additional amount it is thought just compensation requires. This procedure is usually provided by statute. Of course, where property is acquired by voluntary purchase, the amount of compensation is determined by the dickering and not the judicial process.

To determine compensation a jury trial is not necessary for the taking of property by requisition, nor is it necessary, under the Constitution,<sup>267</sup> in condemnation proceedings by the United States.<sup>268</sup>

The Conformity Act<sup>269</sup> has been thought to require the federal proceedings to be conducted along the lines of state procedure—a requirement which has proved quite unsatisfactory to the federal government and has resulted in a multitude of methods of trial: juries, commissioners, and courts. Recently, however, some federal courts have departed from a strict adherence to the Conformity Act.<sup>270</sup>

The Tucker Act<sup>271</sup> gives the Court of Claims and the District Courts jurisdiction to hear claims against the United States arising out of authorized expropriations of property. Besides this permanent act, a number of the war

<sup>264</sup>*Cf.* *Jacobs v. United States*, 290 U. S. 13 (1933); *Phelps v. United States*, 274 U. S. 341 (1927); see *United States v. Lynah*, 188 U. S. 445, 472 (1903).

<sup>265</sup>See *Rose v. State*, — Cal. —, 123 P. (2d) 505 (1942). The implied contract theory was rejected in *Bradley v. The King* [1940] 4 D. L. R. 49. See also *Central Control Board v. Cannon Brewery Co.* [1919] A. C. 744, 752.

<sup>266</sup>*United States v. New River Collieries*, 262 U. S. 341, 343 (1923); *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299, 304 (1923); *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327 (1893); *United States v. McIntosh*, 2 F. Supp. 244 (E. D. Va. 1932). In *National City Bank v. United States*, 275 Fed. 855 (S. D. N. Y. 1921), *aff'd on other grounds*, 281 Fed. 754 (C. C. A. 2d 1922), *cert. denied*, 263 U. S. 726 (1924), the court refused to follow the basis of valuation fixed in an executive order.

<sup>267</sup>It may be required where Congress requires conformity to state condemnation proceedings, 25 STAT. 352, 40 U. S. C. § 258 (1888), or where a statute confers jurisdiction on the district court to hear expropriation claims only.

<sup>268</sup>*United States v. Kenesaw Mountain Battlefield Ass'n*, 99 F. (2d) 830 (C. C. A. 5th 1938); *United States v. Hess*, 71 F. (2d) 78 (C. C. A. 8th 1934). See *United States v. Jones*, 109 U. S. 513, 519 (1883).

<sup>269</sup>25 STAT. 357, 40 U. S. C. § 257 (1888).

<sup>270</sup>See *United States v. 243.22 Acres of Land in Village of Farmingdale*, 43 F. Supp. 805 (E. D. N. Y. 1942).

<sup>271</sup>43 STAT. 972 (1925), 36 STAT. 1136 (1911), 28 U. S. C. §§ 41(20), 250(1).

expropriation acts designate courts in which the disgruntled owner may press his claim. Usually, but not always, the reference to these courts is similar to that in the Tucker Act.

There is considerable justification for the courts to take upon themselves the final determination of just compensation. The legislature is not in a position to make individual determinations. The executive branch of the government when it takes property might be tempted to act like any other buyer who has the power to fix his own price.<sup>272</sup>

In general, in other countries, the method of determining compensation for wartime takings, when there is a disagreement as to the amount of compensation, is to have an initial determination by an administrative tribunal with a right of ultimate determination by a judicial court; departures from this procedure, however, are not infrequent. In Germany, the Contributions Law provides for an administrative determination and an administrative review, but no recourse to the courts is allowed.<sup>273</sup> In France, the law of November 28, 1938,<sup>274</sup> provided for an evaluation commission to sit in each department.<sup>275</sup> The requisitioning authority was not required to follow the recommendation of this commission, but had to report its reasons to a higher authority if it did not. Resort to the courts was provided for. In England, a special compensation tribunal was set up by the Compensation Defence Act of 1939, but under the Defence Regulations, for some kinds of taking, a distinctly different method for ascertaining compensation has been established.<sup>276</sup>

In 1939, a Defence Powers Compensation Committee was appointed upon which are representatives of the financial agencies of the government as well as representatives of the requisitioning bodies. The Committee appointed a legal sub-committee and a valuation sub-committee. This Committee has considered questions concerning the interpretation and administration of the Compensation Defence Act, and this has made for uniformity in the treatment of claims.<sup>277</sup> The valuation staff of the Inland Revenue is frequently used in

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<sup>272</sup>Most of the acquisitions of the government are obtained by voluntary agreement and the price is eminently fair, but where a disagreement reaches the courts, the owner is wont to get more than the rejected offer, although less than what he demanded.

<sup>273</sup>The Weimar Constitution, Art. 153, provides that: "In case of dispute about the amount of compensation the ordinary courts are to be open for relief, insofar as Imperial statutes do not otherwise provide."

<sup>274</sup>C. 2.

<sup>275</sup>§ 41. It consists of an equal number of representatives of the public administration and of the economic, industrial, commercial, or agricultural groups. Special evaluation commissions could be set up for certain categories of property, such as ships.

<sup>276</sup>*E.g.*, S. R. & O. No. 381 (1942).

<sup>277</sup>Report of Mr. John W. Morris on the requisitioning of land and buildings and the operation of the Compensation (Defence) Act of 1939, Cmd. 6313 (1941).

determining compensation.<sup>278</sup>

In Australia, in 1939, a Defence Impressment Order provided for the impressment of animals or things for defense purposes by purchasing offices, and set up a compensation board to deal with claims for compensation. In December, 1941, the Order was amended to provide for an assessment committee in addition to the compensation board. Recently a code of compensation has been issued which provides for appeals to courts of competent jurisdiction.<sup>279</sup> Prior to this codification there was considerable variation from one regulation to another in the methods of determining compensation.<sup>280</sup> Apparently some variation still exists.<sup>281</sup>

In Canada the typical provision as to determination of compensation in respect to property taken by a controller, is that it is to be determined by the controller with approval of the Minister, or upon reference by the Minister, by the Exchequer Court.

#### *F. Medium of Payment*

Must compensation be payable in money? The Constitution merely says that just compensation must be given. There are rather impressive statements by the courts, however, that it must be paid in money.<sup>282</sup> Since ordinarily money is the only medium which enables one to make good his loss, there is much justification in this rule. It has the further advantage of preventing payment being made in bonds or securities which may be of varying soundness. To avoid this latter possibility, the Cuban Constitution expressly provides for payment in cash.<sup>283</sup> Moreover, the valuation process probably would be exceedingly more difficult than it now is if barter were substituted as a measure of value. In other countries it is generally provided that compensation is to be paid in money.<sup>284</sup>

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<sup>278</sup>*Ibid.*

<sup>279</sup>See (1942) 15 Austr. L. J. 259.

<sup>280</sup>*Cf.* Reg. 54 (taking possession of land by suit in court); Reg. 57 (taking property other than land by suit in court, or as otherwise specified in the Minister's order).

<sup>281</sup>S. R. No. 18 (1940) (Cold Store Regulation, as the Governor-General directs); S. R. No. 65 (1940) (dried fruits, as Minister of State for Commerce determines); S. R. No. 176 (1940) (at price agreed upon or at price determined by Commonwealth Prices Commissioner after a hearing); S. R. No. 96 (1939) (Wheat Acquisition Order, as the Minister of State for Commerce, on the recommendation of the Australian Wheat Board, determines). The Minister need not make a determination until a sufficient quantity of any wheat acquired by the Commonwealth has been disposed of, to enable the Board to make a just recommendation; but the Minister has discretion to make payments on claims prior to such determination.

<sup>282</sup>*Olson v. United States*, 292 U. S. 246, 255 (1934); *De Luca v. United States*, 84 Ct. Cls. 217, 245 (1936).

<sup>283</sup>Cuban Constitution of 1940, Art. 24.

<sup>284</sup>See MARIN, *EXPROPRIATION FOR PUBLIC USE IN THE DIFFERENT COUNTRIES*, Congress of Local Authorities, Expropriation of Land (Seville, 1928).

There may be occasions where the courts might permit some deviation from this rule.<sup>285</sup> Whether there should be the same rule in respect to government obligations as there is in respect to private or municipal obligations is arguable. Payment in government bonds which are negotiable might well be an acceptable medium of payment in certain instances, especially those which are redeemable in a short time. If there were a general law that a certain percentage of all capital should be loaned to the government, it is believed that an award could be paid partly in cash and partly in bonds.

If, because of immediate governmental needs, an automobile is taken from someone in New York, the Government could restore to him a similar automobile from its surplus stock held elsewhere, providing there was no substantial change in his position. If title has not been taken, and if the government damages property in such a way as to justify the finding of a compensable damage, the government should be entitled to exonerate its liability by replacing or repairing the property within a reasonable time.<sup>286</sup>

Certainly if an owner consents, the government should be able to pay him something other than money and to exercise its power of eminent domain to acquire the substitute item.<sup>287</sup> It may be noted, further, that special benefits resulting to untaken portions of the same tract of land may be considered as part of the compensation for that which was taken.<sup>288</sup>

#### G. *The Problem under the Fifth Amendment*

The Fifth Amendment provides:

"... nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Taken" has been the mystic word around which most of the litigation in respect to the right of compensation has revolved. The approach has been

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<sup>285</sup>Cf. the arrangement in respect to Dutch ships requisitioned in the first world war as to investment of part of the compensation in the United States and England, *Report on Negotiations Arising Out of Requisitioning of Dutch Vessels*, FOREIGN RELATIONS (Supp. 1, 1918).

<sup>286</sup>See *The Case of Saltpeter*, 77 Eng. Rep. 1294 (1606). See *infra* p. 525.

<sup>287</sup>See Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940), 20 B. U. L. Rev. 651, 672 *et seq.* as to excess and substitute condemnation. In the first world war, in a few instances, where dilapidated buildings were taken by the government for billeting purposes, the government paid to the owner, with the latter's consent, a sum lower than its appraised value because of having made repairs to the premises. Cf. *English Acquisition of Land*, October, 1919 (providing for reasonable cost of equivalent reinstatement). See MARIN, *supra* note 284.

<sup>288</sup>*Bauman v. Ross*, 167 U. S. 548 (1897); *United States v. River Rouge Imp. Co.*, 269 U. S. 411 (1926); *United States v. Indian Creek Marble Co.*, 40 F. Supp. 811 (E. D. Tenn. 1941).



to see whether there has been a "taking." If there is a "taking" the Constitution requires just compensation. If there is no "taking" this requirement is absent. It is believed that over-emphasis on this approach has caused confusion and artificiality which might have been avoided by greater attention to what is just compensation under the circumstances.

The "no taking cases" may be divided into four kinds: (1) where there has been a "regulation" rather than a "taking" of property; (2) when there has been a wrongful expropriation of property—a tort for which a remedy may lie against an offending official but not against the federal government; (3) when there has been a rightful expropriation and "consequential damages" are suffered; and (4) when there has been an expropriation of property but not a "taking" because the property has been held subject to a right to take without compensation.

1. *Regulation or Expropriation.*—The courts have been troubled over where to draw the line between an exercise of the police power and the exercise of the power of eminent domain.<sup>289</sup> The Supreme Court has said that to the extent the states could affect property rights under the Fourteenth Amendment without liability for compensation, the federal government could do likewise.<sup>290</sup> The substantiality of the injury appears to be an important element in deciding whether there has been an exercise of the eminent domain power or the police power.<sup>291</sup> There are conflicting and seldom expressed considerations in determining when the police power has been used, or when there has been an exercise of eminent domain. On the one hand, there is the belief that an emphasis upon the obligation to pay for injuries caused by public measures would mean that such measures would not and could not be carried out.<sup>292</sup> On the other hand, there is the belief that an emphasis upon freedom to carry out public measures without liability for compensation would emasculate the Fifth Amendment and encourage a resort to regulation as a means of taking without payment.<sup>293</sup>

In wartime, of course, the number and types of control over property rights are greatly augmented. The result has been that when a property owner

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<sup>289</sup>See Abels, *Price Control in War and Emergency* (1942), 90 U. OF PA. L. REV. 675.

<sup>290</sup>*Hamilton v. Kentucky Distilleries*, 251 U. S. 146 (1920).

<sup>291</sup>*Penna. Coal Co. v. Mahan*, 260 U. S. 393 (1922): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

<sup>292</sup>See *Pine Hill Coal Co. v. United States*, 259 U. S. 191, 196 (1922).

<sup>293</sup>This possibility is not imaginary. In *Miramar Co. v. City of Santa Barbara*, — Cal. App. —, 123 P. (2d) 643, 647 (1942), the court, in denying recovery for injury to plaintiff's littoral lands from the construction of a breakwater by the city, said that liability would attach only "when the damage to private property was not so essential to the general welfare as to be justified under the police power."

claims a loss of property by reason of a war measure, the government cries "regulation"—the owner, "a taking."

The present opinion seems to be that property losses suffered by obedience to general regulations which are fair and equitable are not compensable.<sup>294</sup> The line between expropriation and regulation is often very misty; but in the main, if the claimant can show no particular injury other than that suffered by other members of the public, and no physical appropriation by the government, a "regulation" rather than "a taking" is likely to be found.<sup>295</sup> Hardship suffered by a restriction on the use of property has been held not to be a constitutional objection.<sup>296</sup> In England, the Defence of the Realm Losses Commission,<sup>297</sup> in its first report, stated that it was not within its power to give relief for loss arising through the enforcement of an order of general application; but that applicants, in order to obtain compensation, must be persons whose business or property had been subjected to a direct and particular interference, such as would have given cause for action if between subjects.<sup>298</sup>

An attempt has been made to justify regulatory power on the theory that the injury or destruction of property without appropriation cannot support a claim for compensation.<sup>299</sup> As will be pointed out later, however, the adoption of such a theory by the courts is very doubtful.<sup>300</sup> Where the adverse effect is widespread, just compensation under the circumstances might allow little, if any, compensation since the loss would be so universal that victims would be called upon to contribute.<sup>301</sup> There is perhaps a pragmatic justi-

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<sup>294</sup>See Abels, *Price Control in War and Emergency* (1942) 90 U. OF PA. L. REV. 675, 676; Freund, *The Emergency Price Control Act of 1942; Constitutional Issues* (1942) 9 LAW AND CONTEMP. PROBLEMS 77; Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions* (1942) 9 LAW AND CONTEMP. PROBLEMS 22, n. 24; Brief of Office of Price Administration, *Hearings before H. Com. on Banking and Currency on H. R. 5479*, Pt. 1, 77th Cong., 1st Sess., p. 220 *et seq.*; Note, *Legal and Economic Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 835-836; Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 488. When the priorities warrants bill for vessels was before Congress, an attempt was made to include a provision for just compensation. The United States Maritime Commission filed a statement in which it advanced the distinction between a regulation and a taking, see *Hearings before S. Com. on Commerce on H. R. 4700*, 77th Cong., 1st Sess., pp. 45-47.

<sup>295</sup>See EXPROPRIATION OF PROPERTY FOR NATIONAL DEFENSE (Dep't of Justice, 1940) Ch. VIII, *F. Feltz v. Central Neb. Power & Irr. Dist.*, 124 F. (2d) 578 (C. C. A. 8th 1942) (even though damages are greater in degree).

<sup>296</sup>*Ruppert v. Coffey*, 251 U. S. 264 (1920).

<sup>297</sup>See *infra* p. 523.

<sup>298</sup>The Third Report of the War Compensation Court (1921-1923) enumerates some of the general prohibitions for which no recovery was given: *e.g.*, prohibition of photography in a particular neighborhood.

<sup>299</sup>See Abels, *supra* note 294.

<sup>300</sup>See *infra* p. 524.

<sup>301</sup>See Duguitt, *Compensation for Losses of War* (1919), 13 ILL. L. REV. 357, 358.

fication for denying compensation for losses suffered by regulation. Valuation of property to which title is taken, or valuation of the use of property, is an everyday matter in the determination of which the courts may rely upon the practices of the market place or traditional principles. But where neither title nor possession is taken, recovery of compensation often becomes a highly conjectural matter of determining loss.<sup>302</sup>

Although case authority is not definite on this question, there are several cases favoring the above view.<sup>303</sup> There are a few judicial statements to the contrary.<sup>304</sup> It is possible that a direct and extremely burdensome regulation, generally affecting certain property rights, would be considered "a taking." In order to further the public interest, the government may, without liability for compensation, forbid an owner to destroy his own property.<sup>305</sup> It is believed that a freezing order which denied the owner any right to dispose of his property,<sup>306</sup> for any considerable time, would be a taking of property for which compensation would be required, or a depreciation of property values without due process which could be attacked.<sup>307</sup> Property possessed for the purpose of sale is of little use to the owner if he cannot sell it. Its value lies in its saleability. However, when the government freezes transfers of such property, it is believed that it has a reasonable time within which to determine whether to requisition the property or to release it for private use,<sup>308</sup> and that no compensation need be paid therefor. A temporary interference with property rights in the course of carrying out a public need is not a compensable taking.<sup>309</sup>

<sup>302</sup>See *infra* p. 53 *et seq.*

<sup>303</sup>See *Pine Hill Coal Co. v. United States*, 259 U. S. 191, 196 (1922); *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253 (1929); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146 (1919); *Legal Tender Cases*, 12 Wall. 457, 551 (1870); *De Palma v. Town Plan Commission of Greenwich*, 123 Conn. 257, 193 Atl. 868, 872 (1937).

<sup>304</sup>See *Matthew Addy Co. v. United States*, 264 U. S. 239 (1923); *GARRETT, GOVERNMENT CONTROL OVER PRICES* (1920) 397.

<sup>305</sup>*Marchese v. United States*, 126 F. (2d) 671 (C. C. A. 5th 1942).

<sup>306</sup>*Cf.* Amendment No. 3, to supplementary order No. N-15-B, 7 Fed. Reg. 512 (rubber) which restricted the consumption of rubber without government approval.

<sup>307</sup>This might result in compulsory abandonment. *Query* what position an owner would be in, if he were compelled to maintain the property in good condition without a right to dispose of it or use it himself. The R. F. C. has agreed to purchase excess inventories of new tires and tubes for passenger automobiles frozen by rationing orders of the O. P. A. Some 7,500,000 tires and tubes have been frozen, out of which it is estimated the R. F. C. will purchase up to 5,000,000. See Report of March 21, 1942, of the Secretary of Commerce covering the War and Defense Activities of the Reconstruction Finance Corporation and its subsidiaries (March 28, 1942), 7 FOR. COM. WEEKLY 6.

<sup>308</sup>*Henderson v. Smith Doubles Co.*, 10 U. S. L. WEEK. 2598-99 (E. D. Va. 1942).

<sup>309</sup>*Transportation Co. v. Chicago*, 95 U. S. 635 (1878); *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. 40 (1894). This rule obtains even under state constitutions requiring compensation where property is taken or damaged. *Sholars v. Louisiana Highway Commission*, — La. App. —, 6 So. (2d) 153 (1942). Some Congressmen have expressed

The Supreme Court has held that where one obeyed an order to divert coal from one person to another and received from the latter the general maximum price fixed by the Fuel Administrator, he could not recover the difference between his contract price with the first person and the price received from the second, even though under the applicable statute, price-fixing by the Fuel Administrator could not affect pre-existing contracts.<sup>310</sup> Justice Holmes said that, "If the law requires a party to give up property to a third person without adequate relief the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker." The opinion does not make very good sense, since, if the consignor had refused to make the diversion at the ceiling price, the government would have had to requisition the coal and pay at least the contract price. Moreover, it has the effect of penalizing the person who cooperates in the war effort.<sup>311</sup> It is difficult to see why the diversion order was not a taking, or to justify the decision on any other grounds. The government argued in its brief that this was not a taking, and has relied upon the decision as a holding that the effect of regulation on property rights is not compensable. Despite other decisions to the same effect,<sup>312</sup> when this argument was made by the government in a subsequent case it was rejected with this brusque comment: "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."<sup>313</sup> In *International Paper Co. v. United States*,<sup>314</sup> the Secretary of War placed an order and requisitioned water power. An agreement was then made between the supplier and the Secretary that the United States would waive delivery on condition that the water power would be supplied to a third

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the view that under the Fifth Amendment "the effect of the order of the Price Administrator freezing stocks of new automobiles and trucks was to seize and confiscate the property of private individuals and corporations without making any provision for compensation for the property in effect seized," 88 CONG. REC. 3583, but the Congress as a whole does not seem to have adopted this view and it is clear that freezes thus far have permitted disposition by the owner, albeit limited in scope.

<sup>310</sup>*Morrisdale Coal Co. v. United States*, 259 U. S. 188 (1922); *accord*, *E. I. duPont de Nemours & Co. v. Hughes*, 50 F. (2d) 821 (C. C. A. 3d 1931); *cf.* *United States v. Carver*, 278 U. S. 294 (1929); *National Surety Co. v. United States*, 72 Ct. Cls. 369 (1931) (order to take on a specified cargo upon the alternative of refusal of clearance and taking on of such cargo, is not a taking or requisitioning of the vessel). The courts found no difficulty in reaching a similar result where the order was directed to a selling agent, where there was no plant which could be commandeered if the order was not obeyed. *Atwater & Co. v. United States*, 65 Ct. Cls. 621 (1928), *cert. denied*, 278 U. S. 618 (1928).

<sup>311</sup>*Cf.* *Corona Coal Co. v. Davis*, 120 F. (2d) 738 (C. C. A. 5th 1927) (when one refused to deliver at his contract price, the Railroad Administration requisitioned the coal). The owner then sued and recovered as *just compensation* more than the contract price. See also *Davis v. Newton Coal Co.*, 267 U. S. 292 (1925).

<sup>312</sup>See *supra* note 310.

<sup>313</sup>*Davis v. Newton Coal Co.*, 267 U. S. 292, 301 (1925).

<sup>314</sup>282 U. S. 399 (1931).

person. In a suit for compensation by one having a property right to draw water for this mill, the government relied heavily on the *Morrisdale* case, but Justice Holmes, speaking for a 4-3 court, held that there was "a taking."

The proper rule would seem to be that an order to deliver property to a third person in aid of the war effort is just as much "a taking" as an order to deliver it to the government to be transferred to the same third person. The liability of the government in the first instance should be one of secondary liability. It is not unusual for the government to take property to be paid for by private persons rather than by the government.<sup>315</sup>

In this and other countries, the denial of a right of compensation for property losses suffered by drastic regulations does not necessarily mean that no relief exists. In Germany, closed factories have been said to receive indemnity paid out of a levy on industrial companies still working.<sup>316</sup> In the United States, there is a growing tendency to cushion the effects of regulatory control by subsidies<sup>317</sup> or other compensatory devices.<sup>318</sup> This is also true in England.<sup>319</sup>

In Australia, provision has been made to give compensation in addition to charter rates for certain requisitioned ships because requisitioning prevented the recovery of losses and outgoings in the manner contemplated by the Commonwealth Price Commissioner in exercising his price powers.<sup>320</sup>

2. *Tort*.—The courts have construed the Fifth Amendment not to cover wrongful takings. Therefore, in view of the immunity of the government

<sup>315</sup>United States v. River Rouge Imp. Co., 285 Fed. 111 (C. C. A. 6th 1922).

<sup>316</sup>THE ECONOMIST, October 26, 1940.

<sup>317</sup>See Press Releases of Office of Price Administration, PM—3338, May 17, 1942; PM—3347, May 19, 1942; 7 Fed. Reg. 3749, 3900 (bituminous coal); PM—3542, June 4, 1942 (charter rates).

<sup>318</sup>The Inventory and Requisitioning Branch of the War Production Board has established a schedule of prices to be paid from R. F. C. funds for raw, semi-processed, and scrap materials found in possession of manufacturers prohibited by priority regulation from using them. If dissatisfied with the price offered, the owner may allow the materials to be requisitioned and take his chances on the compensation accorded him by the courts. See W. P. B. Press Release No. 784, April 6, 1942. In excepting purchases by the Metals Reserve Co. (a subsidiary of the Reconstruction Finance Corporation) of stocks of metallic nickel frozen by the nickel conservation order M-6-b, the Office of Price Administration issued a press release, stating: "In view of the fact that such materials have been rendered useless in the hands of their holders by war restrictions, the W. P. B. has recommended that the Metals Reserve Company buy such materials at prices higher than the maximums established for scrap in Revised Price Schedule No. 8." PM 3158, May 1, 1942. Cf. Pub. L. No. 549, 77th Cong., 2d Sess. (R. F. C. to buy, or make loans in respect to, rationed commodities).

<sup>319</sup>See (June 3, 1942) BULLETINS FROM BRITAIN, p. 3 *et seq.*; (1940) 21 J. OF PARLIAMENTS OF THE EMPIRE 45. In England, concentration of non-essential industry into the hands of a few as a result of government impetus has been thought to entail no legal obligation to compensate those frozen out. But there is considerable feeling that adequate relief should be given, see THE ECONOMIST, February 14, 1942.

<sup>320</sup>S. R. 99 (1942).

from suit for torts, no recovery may be had against the government for a wrongful taking, even though the owner may suffer appreciable loss.<sup>321</sup> He may, however, have a cause of action against the official for his tort.<sup>322</sup>

3. *Damages.* (a) *Disturbance damages.*—The courts have definitely established that just compensation does not include all damages caused by a taking. Under the rubric "consequential damages" they have denied recovery for many types of losses.<sup>323</sup> This position of the courts seems to be based upon a fear of an inordinate drain on the public purse because of the great discrepancy in the value of the thing obtained and the losses suffered, and the difficulty in ascertaining subjective or highly conjectural damages.<sup>324</sup>

Recovery for moving expenses,<sup>325</sup> increased expenses<sup>326</sup> in running a business in a new place, and loss from breakage in moving<sup>327</sup> has been denied. Expenses and loss suffered by an owner in not making full use of his property pending condemnation have been held not recoverable where the United States abandoned the proceedings and did not take possession or disturb the owner's occupation.<sup>328</sup> It has been held that frustration of a contract right is not a compensable taking.<sup>329</sup>

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<sup>321</sup>In *Bussey v. United States*, 70 Ct. Cls. 104 (1930), a plantation was taken under the War Purposes Act which authorized the taking of realty. A good deal of personality was destroyed. *Held*, recovery for value of land; none for personality. It would seem that where the government got the benefit of the use of the property, the courts should find an appropriation rather than a tort. *Rigsbee v. United States*, 58 Ct. Cls. 43 (1923).

<sup>322</sup>*Sloan Shipyards v. United States Fleet Corp.*, 258 U. S. 549 (1922).

<sup>323</sup>*Mitchell v. United States*, 267 U. S. 341 (1925); *Chicago, Milwaukee & St. P. R. Co. v. City of Minneapolis*, 232 U. S. 430 (1914).

<sup>324</sup>*Cf. Duguit, Compensation for Losses of War* (1919) 13 ILL. L. REV. 357, 358. See Report of John W. Morris on the requisitioning of land and buildings and the operation of the Compensation (Defence) Act of 1919, Cmd. 6313 (1941) where, to show that universal compensation is impossible, the following examples were put: (1) Suppose small businessmen are called into the army; (2) Suppose there are losses from rationing and other regulations. The present writer confesses an inability to see this impossibility, although he admits the difficulty.

Under the French law of November 28, 1938, indemnities for the requisition of property were to include only the actual loss imposed on the day of requisition. Where only the right to use was demanded, the owner was entitled to an indemnity taking into account the deprivation of enjoyment imposed upon him, "which indemnity will be settled with him at the end of each period of time fixed by the evaluation commission." But the period was not to exceed six months.

<sup>325</sup>*Southern Products Co. v. United States*, 61 Ct. Cls. 801 (1926); *Gershon Brothers Co. v. United States*, 284 F. (2d) 849 (C. C. A. 5th 1922).

<sup>326</sup>*Gershon Brothers Co. v. United States*, *supra* note 325.

<sup>327</sup>*Gershon Brothers Co. v. United States*, *supra* note 325. *Seem*, where special equipment was abandoned, *Thermal Syndicate v. United States*, 81 Ct. Cls. 446 (1935); or loss suffered from a forced sale of personality, *Clark v. United States*, 67 Ct. Cls. 388 (1929). For another "hard" case, see *Carr v. United States*, 28 F. Supp. 236 (W. D. Ky. 1919).

<sup>328</sup>*Shoolman v. United States*, 83 Ct. Cls. 410 (1936).

<sup>329</sup>*Russell Co. v. United States*, 261 U. S. 514 (1923); *De Laval Steam Turbine Co. v. United States*, 284 U. S. 61 (1931). This last case is extraordinary in that it contains a statement by the Solicitor General of the United States that it was his personal

While recovery is almost always denied for a loss of anticipated profits,<sup>330</sup> there is confusion as to whether anticipated profits may be considered in determining the value of the property taken. It would seem common sense to take the possibility of such profits into consideration, as would an ordinary purchaser,<sup>331</sup> but many courts have made it difficult to introduce any evidence thereon for fear of the speculative nature of such evidence.<sup>332</sup>

Where plants, engaged wholly or primarily on government contracts, are taken over temporarily by the government because they are strike-bound, or for some other reason, it would seem that no compensation would be required if the owner gets the benefit of his contracts.<sup>333</sup> It would be difficult for the plant owner to prove loss if his ability to fill the contract was doubtful before the government interfered.<sup>334</sup>

Business, as such, has not been favored in the law of eminent domain. It is generally held that a loss of business arising from a taking of property need not be compensated.<sup>335</sup> During the last world war the Navy Department served notice on the owners and tenants of the Bush Terminal Model Loft Building that it was commandeering the building. The notice stated that the Navy Department would accept occupancy on or before December 1, 1918, that the Department's obligation for rent would start when space was actually vacated, and that vacation must be before December 1. In September the Department cancelled the commandeering notice. In a series of cases, the Court of Claims held that no recovery could be had by tenants who, after receipt of the first notice, had entered into other leasing commitments, and had incurred expenses for moving, legal services, title guarantees, drawing plans for a new plant, and dismantling the business on the premises.<sup>336</sup> A compensable taking does not result from an injury to property which is benefited to a greater degree in other ways by the act complained of.<sup>337</sup> There

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opinion that the profits should be recoverable. See also, *Nitro Powder Co. v. United States*, 71 Ct. Cls. 369 (1930).

<sup>330</sup>See ORGEL, *VALUATION UNDER EMINENT DOMAIN* (1936). Cf. *De Laval Steam Turbine Co. v. United States*, *supra* note 329.

<sup>331</sup>Compare *Board of Chosen Freeholders v. Emmerich*, 57 N. J. Eq. 535, 42 Atl. 107 (1898) with *Sanitary District v. Pittsburgh*, 216 Ill. 575, 75 N. E. 248 (1905), and *Stephenson Brick Co. v. United States*, 110 F. (2d) 360 (C. C. A. 5th 1940).

<sup>332</sup>*United States v. Carver*, 278 U. S. 294 (1929); *Berg v. United States*, 59 Ct. Cls. 462 (1924), *appeal dismissed*, 169 U. S. 535 (1925); *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923).

<sup>333</sup>See *supra* p. 495, 501.

<sup>334</sup>No compensation has been paid by the War Department for the plants temporarily taken over by them since 1940. In some instances the private owners have appreciably benefited by government occupation or control.

<sup>335</sup>*Mitchell v. United States*, 267 U. S. 341 (1925).

<sup>336</sup>*Acme Die Casting Corp. v. United States*, 81 Ct. Cls. 415 (1935); *Thermal Syndicate, Ltd. v. United States*, 81 Ct. Cls. 446 (1935).

<sup>337</sup>*United States v. Sponenbarger*, 308 U. S. 256 (1939).

would seem to be a duty upon claimants to take reasonable steps to minimize the loss arising from the requisition.<sup>338</sup>

Where there has been a technical taking, but no actual control of the property or disturbance of the owner, just compensation may not require payment to such owner, at least where there is no showing that the owner refrained from using the property because he expected momentary government interference.<sup>339</sup> Where, during wartime, the government temporarily takes possession of vacant property, it is arguable that the fiction of a willing buyer and a willing seller should be departed from to see whether the owner actually suffered a loss and whether, if compensation is given to him, he would not be in a much better pecuniary position than if his property had not been taken.<sup>340</sup>

What to do about these "disturbance damages" has troubled the legislature as well as administrative officials.<sup>341</sup> On several occasions proposals have been made to permit recovery, but such suggestions have failed to show where to draw the line and how to determine the approximate cost of a project beforehand if such damages were recoverable.<sup>342</sup> The government, through the Farm Security Administration, has endeavored to help farm families who have had to move on short notice<sup>343</sup> because of government acquisition of land for war purposes. Help has taken the form of (1) cash grants for subsistence and actual moving expenses, (2) loans to enable them to start farming again, (3) loans to tide persons over until they get paid for their

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<sup>338</sup>Claim of the Elliott Steam Tug Co., Claim No. 4, 1st Rept., War Compensation Court (1921); Claim of Monypenny, Claim No. 17, 3d Rept., War Compensation Court (1922).

<sup>339</sup>Marion & R. V. Ry. Co. v. United States, 270 U. S. 280 (1926); Nevada-California-Oregon Ry. v. United States, 65 Ct. Cls. 75 (1928), *cert. denied*, 278 U. S. 602 (1928). *But cf.* Atlantic Refining Co. v. United States, 72 Ct. Cls. 1 (1931) where the government was held entitled to earnings above the requisition rate when the owner had been allowed to complete certain contracts before actual control was taken.

<sup>340</sup>FIRST REPORT OF DEFENCE OF THE REALM LOSSES ROYAL COMMISSION (London, 1915) § 8; Claim of London County Council, Fourth Report, War Compensation Court (1923). A claim of loss from inability to sell to a purchaser at war prices because of the occupancy of the government should fail unless the owner can demonstrate that he desired to sell, and that if there had been no requisition, he could have sold at the price desired, Claim of Stranger, Claim No. 6, 5th Rept., War Compensation Court (1925).

<sup>341</sup>In some places a flat percentage of the value of the property is added to compensation to cover such damages, *e.g.*, the Acquisition of Land for Public Purposes Act of the Bahamas. *Cf.* Small Holding Act of 1910, 10 Edw. VII and 1 Geo. V, c. 34, providing for disturbance damages for tenants.

<sup>342</sup>See as to the Second War Powers Act, 88 CONG. REC. 1691, 1694 *et seq.*, 1709 *et seq.*, 1839 *et seq.*, 1832. It was felt, also, that the ordinary rules of damage should not be departed from in time of war. A possible solution might be a special administrative fund to be available up to a certain amount for individual cases of hardship. The War and Navy Departments have such funds for damage to property arising out of their operations.

<sup>343</sup>THE AGRICULTURAL SITUATION (Dep't of Agriculture, December, 1941), states that more than 14,000 families were thus affected.



land by the government, and (4) aid in locating other farming land.<sup>344</sup> Relocation corporations were established in a number of states to purchase farms which displaced farmers could acquire from the corporations,<sup>345</sup> but the Comptroller General has ruled against the validity of such corporations.<sup>346</sup> In England, during the first world war, a commission known as the Defence of the Realm Losses Royal Commission was created "to inquire and determine, and to report what sum [in cases not otherwise provided for] ought in reason and fairness to be paid out of public funds to applicants . . . in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the defence of the Realm." Under the Indemnity Act of 1920, this Commission became the War Compensation Court. While it construed its jurisdiction rather narrowly,<sup>347</sup> it did afford relief in a number of instances where the ordinary rules of compensation would have denied relief.<sup>348</sup>

In connection with the requisitioning of land and buildings and the operation of the Compensation Defence Act of 1939,<sup>349</sup> in England there have been numerous complaints, and because of this the Chancellor of the Exchequer had a report prepared in the fall of 1941, covering these complaints.<sup>350</sup> The report denied the justness of some of the complaints, acknowledged the justness of others, and confessed an inability to suggest a remedy as to some; but in a few instances recommended definite measures of alleviation. In general, the major hardships arose out of dispossessed tenants still bound on their leases. The fact that compensation was not given for loss of profits or good will, or disturbance or expense caused by requisition, was also much complained of. While no compensation is given for consequential damages under this Act, the clause "expenses reasonably incurred" is liberally construed.<sup>351</sup>

Despite some utterances to the contrary,<sup>352</sup> it seems clear that a right to

<sup>344</sup>THE AGRICULTURAL SITUATION, *supra* note 343 at 15.

<sup>345</sup>*Ibid.*; Report of Solicitor of Dep't of Agriculture (1941) 27.

<sup>346</sup>B-23881, May 18, 1942.

<sup>347</sup>See FIRST REPORT OF THE DEFENCE OF THE REALM LOSSES ROYAL COMMISSION (London 1915). See *supra* p. 49.

<sup>348</sup>See Davidson, *The Defence of the Realm Losses Commission and the War Compensation Court* (1923) 5 J. COMP. LEG. & INT. L. (3d ser.) 234. Loss of profits was held recoverable, Claim of Elliott Steam Tug Co. [1922] 1 K. B. 127. See The Second Report of the War Compensation Court, p. 8 *et seq.*

<sup>349</sup>The Compensation Defence Act of 1939 is departed from occasionally in the Defence Regulations, *e.g.*, Reg. No. 79c.

<sup>350</sup>Report of Mr. John W. Morris on the requisitioning of land and buildings and the operation of the Compensation (Defence) Act, 1939, Cmd. 6313 (1941).

<sup>351</sup>Report, *supra* note 350.

<sup>352</sup>The government took this position in *Morrisdale Coal Co. v. United States*, 259

compensation does not depend upon actual use of the property by the government.<sup>353</sup> Destruction of property in the zone of actual combat without liability for compensation has been upheld,<sup>354</sup> apparently upon the basis of tradition,<sup>355</sup> state police power analogies, and a fear of the drain upon public funds if destruction were widespread, rather than upon the wording of the Fifth Amendment.<sup>356</sup> Recognizing this exception, it is just as much a public use to destroy property when necessary as it is to occupy it. In fact, destruction is a use and a taking.<sup>357</sup> The Constitution does not say that a benefit measurable in money must result to the government from a taking.<sup>358</sup> In the last ten years the government has condemned millions of acres of land; in many of them there have been buildings which the government has had to destroy before going ahead with the project. The measure of damages invariably is the value of the land *as enhanced by the buildings*. Any other rule would mean that just compensation would be value to the taker—a principle repudiated by the courts on numerous occasions.<sup>359</sup>

In several situations, again, the courts have permitted recovery for loss in value of land where there was no physical taking of the land in question. Loss or substantial curtailment of access to land has been held compensable.<sup>360</sup> During the first world war the government issued a commandeering order

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U. S. 188 (1922), and took the further position that consideration must move to the government for the Court of Claims to have jurisdiction. The court's handling of these contentions was not very satisfactory.

<sup>353</sup>*Cf.* Russell Co. v. United States, 261 U. S. 514 (1923); Wheeling Steel Corp. v. United States, 74 Ct. Cls. 571 (1931) (cancellation of a contract). *Cf.* Clark v. United States, 59 Ct. Cls. 940 (1924), *rev'd on government's confession of error*, 273 U. S. 774 (1926). Ex. Order No. 8964, 6 Fed. Reg. 6367-6368.

<sup>354</sup>United States v. Pacific Railroad, 120 U. S. 227 (1887).

<sup>355</sup>*Cf.* Penna. Coal Co. v. Mahon, 260 U. S. 393 (1922).

<sup>356</sup>Cormack, *The Universal Draft and Constitutional Limitations* (1930) 3 So. CALIF. L. REV. 361, 362, states the rule to be that a deliberate intention to damage property (precautionary) for war purposes is compensable, but not where damage is caused by pressing danger in the course of military operations. The distinction is often difficult to make. Much of the doubt and confusion on this score arose out of Acts of Congress passed after the Civil War under which the Court of Claims was prohibited from hearing claims against the United States based upon destruction or damage to property by the Army and Navy during the war. See *Heflebower v. United States*, 21 Ct. Cls. 228 (1886). The prohibition extended to the use of realty situated at the seat of war.

<sup>357</sup>"A right may be taken by simple destruction for public use." *Duckett & Co. v. United States*, 266 U. S. 149 (1924). *United States v. Welch*, 217 U. S. 333, 339 (1910); *United States v. Cress*, 243 U. S. 316 (1917).

<sup>358</sup>*Cf.* Ocean S. S. Co. of Savannah v. United States, 64 Ct. Cls. 98 (1917) *cert. denied*, 277 U. S. 584 (1928); *Wheeling Steel Corp. v. United States*, 74 Ct. Cls. 571 (1931) (cancellation of contracts; recovery for loss in value of materials never used by the government).

<sup>359</sup>See *infra* p. 59.

<sup>360</sup>*Federal Real Estate Co. v. United States*, 79 Ct. Cls. 667 (1934); *Vandiver v. United States*, 67 Ct. Cls. 125 (1929). See also, *Schiefelbein v. United States*, 124 F. (2d) 945 (C. C. A. 8th 1942).

for the Bush Terminal in Brooklyn. The Terminal was occupied by a number of tenants carrying on substantial activities. Upon receipt of the commandeering order, many took leases of other premises and moved or began to move. Despite the fact that the government countermanded the commandeering order, without going into occupation, it was held that the tenants were entitled to the difference between the market value of the lease and the rental paid from the date the tenant moved.<sup>361</sup>

Imposing a servitude on property may be "a taking."<sup>362</sup> The principle of severance damages is firmly established in the law of eminent domain. If one owns a parcel of real estate and the government takes only part of it, he may recover not only the loss in value of the remaining tract caused by the severance, but the loss in value caused by the presence of the expected project.<sup>363</sup> There should be no distinction in the case of severance damages to personalty. Certainly if the value of the whole is greater than the value of its separate parts, the owner should be able to recover for the loss of value to the whole, to the same extent he may in the case of realty. Examples of this rule applied to personalty might be the expropriation of automobile tires and machine tools.<sup>364</sup> Just compensation should not be one thing for realty and another for personalty.

Where possession has been taken of property and the property is damaged, it would seem that the government should be required to compensate the owner for the injury suffered,<sup>365</sup> or restore the property to its proper condition, or pay the owner the cost of restoration plus the loss of time incurred by the owners in making the repairs.<sup>365a</sup>

(b) *Taking for navigation.*—It is well settled that structures in and over navigable streams and land within the high water mark are merely limited property rights subject to the servitude of the federal right to destroy them

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<sup>361</sup>*Andrews v. United States*, 86 Ct. Cls. 282 (1938); *Wm. Wrigley, Jr., Co. v. United States*, 75 Ct. Cls. 569 (1932).

<sup>362</sup>*Portsmouth Co. v. United States*, 260 U. S. 306 (1923).

<sup>363</sup>*United States v. Grizzard*, 219 U. S. 180 (1911); *United States v. Welch*, 217 U. S. 333 (1910); *Rasmussen v. United States*, 69 Ct. Cls. 419 (1930).

<sup>364</sup>When the Second War Powers bill was being debated some Congressmen seemed to feel that no recovery could be had for the automobile, 88 CONG. REC. 1705. *Parish v. United States*, 57 Ct. Cls. 529 (1922) supports their position. The court, in part, relied upon the absence of an "implied contract," see *supra* p. 42.

<sup>365</sup>In *West v. United States*, 73 Ct. Cls. 201 (1931), the government occupied land for a military camp and artillery range. *Held*, owner entitled to use and occupation plus \$79,400 for the cost of locating, excavating, and removing unexploded shells left buried on the ground, together with interest on the total from the date of the relinquishment of the property until payment. *But cf.* *Mark Coffee Co. v. United States*, 63 Ct. Cls. 562 (1927).

<sup>365a</sup>*Spreckels v. United States*, 63 Ct. Cls. 64 (1927). See 53 STAT. 1255, 46 U. S. C. § 1242 (1939) (ships).

or curtail their use for the promotion of navigation, without compensation.<sup>366</sup> It does not matter that the navigational improvement is for war purposes.<sup>367</sup>

4. *Market Value.* (a) *The open market.*—The value of personal property, if it has a market price, is much easier to determine than that of realty since, although realty may have a market value, it is rarely traded in enough to have an observable market price. Furthermore, almost always, the interest taken in personalty is the fee title or its use, but some interests in realty taken by the government defy the imagination of the court or jury called upon to evaluate the interest taken.<sup>368</sup>

The general, but not invariable, rule in the law of eminent domain is to use market value as the standard for determining just compensation.<sup>369</sup> The price is that which would be determined by a hypothetical willing seller and a hypothetical willing buyer,<sup>370</sup> considering all the uses for which the property is reasonably suitable.<sup>371</sup> Neither value to the taker,<sup>372</sup> nor value to the owner is the proper test.<sup>373</sup> An owner may not show the value of the property for defense or war purposes.<sup>374</sup> A generally expressed rule is that the owner should be put in as good a pecuniary position as if his property had not been taken.<sup>375</sup> Even this latter rule, however, is often departed from.<sup>376</sup> "Just compensation" is not a matter of static definition.

<sup>366</sup>United States v. Chicago, M. St. P. & P. R. R. Co., 312 U. S. 592, 313 U. S. 543 (1941); Louisville Bridge Co. v. United States, 242 U. S. 409 (1917).

<sup>367</sup>Bailey v. United States, 62 Ct. Cls. 77 (1926), *cert. denied*, 273 U. S. 751 (1927) (oyster beds).

<sup>368</sup>The following is an interest recently taken by the government: fee simple title, subject to public utility highways and easements, and reserving to the owners and claimants all mineral rights, subject to the provision that 40% of the gross proceeds from any minerals produced should be paid to the United States as royalties, up to the amount paid by the United States for the lands.

<sup>369</sup>United States v. New River Collieries, 262 U. S. 341 (1923); Olson v. United States, 292 U. S. 246, 253 (1934). The market value test is widespread, *e.g.*, Jamaica Land Acquisition Law of 1940; English Acquisition Land Act, 1919. Where there has been little sales activity or when the property is unique, reproduction cost is generally admissible to show market value. United States v. Boston, Cape Cod & N. Y. C. Co., 271 Fed. 877 (C. C. A. 1st 1921), but such cost is not admissible, if conditions were such as to make it highly doubtful that anyone would reproduce the thing taken, United States v. Boston, Cape Cod & N. Y. C. Co., *supra*. Cf. A. & B. Taxis v. Secretary of State for Air [1922] 2 K. B. 328. Nor may an owner recover the cost of the property to him as market value. United States v. Certain Lands in Town of Hempstead, 43 F. Supp. 418 (E. D. N. Y. 1939).

<sup>370</sup>Olson v. United States, 292 U. S. 246, 253 (1934).

<sup>371</sup>Olson v. United States, *supra* note 370 at 255.

<sup>372</sup>United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913); Minnesota Rate Cases, 230 U. S. 352, 451 (1913). See Hale, *Value to the Taker in Condemnation Cases* (1931) 31 Col. L. Rev. 1.

<sup>373</sup>United States v. Honolulu Plantation, 122 Fed. 581 (C. C. A. 9th 1903).

<sup>374</sup>United States v. Boston, Cape Cod & N. Y. C. Co., 271 Fed. 877 (C. C. A. 1st 1921).

<sup>375</sup>See Phelps v. United States, 274 U. S. 341, 344 (1927); United States v. New River Collieries, 262 U. S. 341 (1923). Sometimes loss to the owner is said to be the measure of damages, Roberts v. New York City, 295 U. S. 264, 282 (1935).

<sup>376</sup>As in the case of disturbance damages, see *supra* Pt. VII, G, 3, a.

Where the taking precedes the making of the award, just compensation is determined by the value of the property at the time of the taking.<sup>377</sup> Where the award precedes the taking, the most logical and generally the fairest rule is that the value should be determined as of the time of making the award, whether or not property values have fluctuated prior thereto, and whether or not the government has commenced condemnation proceedings or taken possession prior thereto.<sup>378</sup>

Enhancement in market value caused by improvements is not allowed by the courts when shown to have been made in contemplation of the taking.<sup>379</sup>

There is considerable authority to the effect that destruction of an illegal structure, resulting from an exercise of eminent domain, is not compensable,<sup>380</sup> but there is respectable authority looking the other way when the government has not exercised its right to abate the illegal structure.<sup>381</sup> Where the existence or use of property is in violation of law, it would seem that if such property were taken, any increment in value derived from the illegality should be disregarded.<sup>382</sup> The fact that the former owner has paid \$50 for a "boot-leg" tire does not mean that he can extort \$50 from the government. On the other hand, the government probably cannot use the property, and still assert that it has no value because of the illegality.<sup>383</sup> If the government has a right of forfeiture, that right may be pressed even though the property is requisitioned.<sup>384</sup> On the other hand, the amount necessary to make property conform to the law might properly be deducted from the value of the property, or only its value as property subject to abatement should be recovered.<sup>385</sup>

<sup>377</sup>*Olson v. United States*, 292 U. S. 246 (1933).

<sup>378</sup>*United States v. Certain Lands in Town of Hempstead*, 43 F. Supp. 418 (E. D. N. Y. 1939).

<sup>379</sup>*In re Briggs Ave.*, 196 N. Y. 255, 89 N. E. 814 (1909).

<sup>380</sup>*Dep't of Public Works & Buildings v. Hubbard*, 365 Ill. 99, 1 N. E. (2d) 383 (1936); *Kingsland v. Mayor*, 110 N. Y. 569, 18 N. E. 435 (1888); *In re Neptune Avenue in the City of New York*, 254 App. Div. 690, 3 N. Y. S. (2d) 825 (2d Dep't 1938); *Harvey v. L. & B. R. R. Co.*, 47 Pa. 428 (1864); *Diedrich v. N. W. U. Ry. Co.*, 47 Wis. 248 (1877). See *Great Northern Ry. Co. v. Washington Electric Co.*, 197 Wash. 627, 86 P. (2d) 208, 214 (1939).

<sup>381</sup>*Sanitary Dist. of Chicago v. Pittsburgh*, 216 Ill. 575, 75 N. E. 248, 251 (1905); *West Chicago Park Comm'rs v. Boal*, 232 Ill. 248, 83 N. E. 824 (1908); *Matter of State Reservation at Niagara*, 16 Abb. Fr. (N. C.) 159 (N. Y. 1884); *Northern Ry. Co. v. Washington Electric Co.*, *supra* note 380. Cf. *Monongahela Nav. Co. v. United States*, 148 U. S. 312 (1893).

<sup>382</sup>*Cf. Kelleher v. Schoene*, 14 F. (2d) 341, 345 (W. D. Va. 1926), *aff'd*, 278 U. S. 563 (1928); *In re Pier Old No. 49, East River*, 227 N. Y. 119, 124 N. E. 148, 152 (1919).

<sup>383</sup>*In re Pier Old No. 49, East River*, *supra* note 382; cf. *State v. Bancroft*, 148 Wis. 124, 134 N. W. 330 (1912). Perhaps the nature of the illegality might have some effect on the attitude of the courts. Cf. statement of Admiral Land in respect to sabotaged ships, *Hearings before S. Subcomm. of Comm. on Appropriations on H. R. 5412*, 77th Cong., 1st Sess., p. 251.

<sup>384</sup>See *supra* note 202.

<sup>385</sup>*Cf. Ranlet v. Railroad*, 62 N. H. 561 (1883); *West Chester & W. Plank-Road v.*

(b) *The closed market.*—Since just compensation must be just to the government,<sup>386</sup> as well as to the property owner, it follows that a taking by the government would not require compensation in excess of a price ceiling established for such property if, in the absence of such taking, the owner could not lawfully have obtained a higher price.<sup>387</sup> Under the ordinary test of market value the owner is not entitled to greater compensation, since this is the generally prevailing price.

In the United States there have been many attempts to regulate prices of commodities. Price maximums were used to a substantial extent during the last world war and have been invoked on a much larger scale during this war. But the price of land has been left free from governmental control. In wartime, the market value of realty is likely to fluctuate considerably. In some places the value of property will accelerate sharply because war activities make profitable the use of property. On the other hand, considerable amounts of realty are likely to be damaged through war action, while many forced sales will occur because of financial embarrassment arising from the death or injury of the provider, or because of some government regulation. If bombing comes to the United States and a buying and leasing pressure is exerted in unbombed communities, a further land boom may be expected.

In Germany, the National Commissioner of Price Control and the National Commissioner for Social Housing have applied price fixing to land.<sup>388</sup> A primary purpose of such regulation is to prevent price increases for building land which are likely to occur in a post war reconstruction area.<sup>389</sup>

In Australia, after the Japanese entry into the war, severe price restrictions

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Chester Co., 182 Pa. 40, 37 Atl. 903 (1897); *Miller v. Huntington & Ohio Bridge Co.*, — W. Va. —, 15 S. E. (2d) 687 (1941).

<sup>386</sup>*Bauman v. Ross*, 167 U. S. 548, 572 (1896).

<sup>387</sup>*Cf. Note, Legal and Economic Aspects of Wartime Price Control* (1942) 51 *YALE L. J.* 819, 840, n. 102. See *Highland v. Russell Car Co.*, 279 U. S. 253, 262 (1929); *cf. Vogelstein & Co. v. United States*, 262 U. S. 337 (1923); *Corona Coal Co. v. Davis*, 20 F. (2d) 738 (C. C. A. 5th 1927). *Cf. Memorandum of Attorney General, H. R. Doc. No. 264*, 72d Cong., 1st Sess. (1932). *But cf. Davis v. Newton Coal Co.*, 267 U. S. 292 (1925) where apparently "spot prices" of those not obeying Government price regulations were used. However, it has never been clear whether authority existed for price fixing during the last world war in the absence of statute.

<sup>388</sup>HEILMANN, PREISBILDUNGUND PREISIBERWACHUNG BEI BANLAND, REICHSARBEITSBLATT, September 25, 1941. The basic authorization has been proclamation, No. 155/37 of the National Commissioner of Price Control of October 6, 1937; proclamation, No. 64/41 of June 10, 1941, from the same source; and a proclamation of June 10, 1941 of the National Commissioner for Social Housing.

<sup>389</sup>HEILMANN, *supra* note 388. In Germany, where capital goods were placed at the disposal of the armed forces under the Contributions Law, it was provided, that any receipts exceeding the book value of the goods were to be exempt from taxation and could be set aside in a special fund out of which replacements could be financed later on. In 1941, tax exemption reserves were extended to farmers and foresters to take care of soil depletion.

were placed upon the sale of land to discourage speculative sales and new construction.<sup>390</sup> These restrictions complemented milder restrictions of an earlier date.<sup>391</sup>

It would seem that the effect on the market value of lawful government restrictions on the use of property should be considered in determining its value when taken by the government. Thus, where the sale of an article requires a permit, that fact may be brought to the jury's attention and they may consider this element in determining the value of the article taken.<sup>392</sup> Fear of going into collateral issues would not justify the preclusion of evidence as to the likelihood of procuring a permit.<sup>393</sup> Furthermore, if wartime conditions or wartime regulations make it probable that certain types of activities will be impossible or restricted, and the value of a property right depends upon such activities, the government, when it takes such property, should not be compelled to pay more than an ordinary "willing buyer" would pay under the circumstances.<sup>394</sup> There is no reason why the owner should get a windfall by the taking.<sup>395</sup>

But if the government fixes a price for an article at which it is to be sold to the government, and such article is not of the kind customarily sold only to the government, and the article is free to sell for more in the open market, it is believed that there would be a violation of the Fifth Amendment if the government compelled the article to be sold to it at the fixed price.<sup>396</sup> In

<sup>390</sup>See National Security (Economic Organization) Regulations, p. 1347. See *THE ECONOMIST*, February 14, 1942; *AUSTRALIA*, March, 1942.

<sup>391</sup>See (1941) 15 *Aust. L. J.* 102.

<sup>392</sup>*Mellon v. Weston Dodson & Co.*, 20 F. (2d) 549 (C. C. A. 1st 1927) (coal meant for export market).

<sup>393</sup>*Cf.*, *ibid.*

<sup>394</sup>*Cf.* *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123, 124-126 (1924); *Perry v. United States*, 294 U. S. 330, 357 (1935); *Smith v. United States*, 67 Ct. Cls. 182 (1929). *But cf.*, *Ocean S. S. Co. of Savannah v. United States*, 64 Ct. Cls. 98 (1917), *cert. denied*, 277 U. S. 584 (1928), where, in the face of such facts, a substantial recovery apparently was allowed.

<sup>395</sup>*Russell Co. v. United States*, 261 U. S. 514 (1923). As long as the courts decline to give recovery for the effect of a regulation to all more or less similarly affected, it would hardly be consistent to ignore the effect of the regulation when the property is taken.

<sup>396</sup>*United States v. New River Collieries*, 262 U. S. 341 (1923); *C. G. Blake Co. v. United States*, 278 Fed. 861 (S. D. Ohio, 1921), *aff'd on other grounds*, 279 Fed. 71 (C. C. A. 6th 1922); *Prince Line, Ltd. v. United States*, 283 Fed. 535 (E. D. N. J. 1922), *writ of error dismissed*, 263 U. S. 727 (1923); *Gulf Refining Co. v. United States*, 58 Ct. Cls. 559 (1923); *Chicago K. & W. R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083 (1893); *cf. Memorandum of Attorney General, H. R. Doc. No. 264*, 72d Cong., 1st Sess. (1932); Note, *American Economic Mobilization* (1942) 55 *HARV. L. REV.* 427, 531, 532. There may be a question as to how general a price control may have to be in order to permit the government to acquire the property at the price ceiling. In *National City Bank v. United States*, 275 Fed. 855 (S. D. N. Y. 1921), *aff'd on other grounds*, 281 Fed. 754 (C. C. A. 2d 1922), *appeal dismissed*, 263 U. S. 726 (1923), the court found a

the absence of a general price ceiling on the article, it would seem that appreciation in value from war causes should be allowed, since otherwise purchasers who had paid the appreciated value would be unfairly penalized, and an owner would not receive enough compensation to be able to purchase similar property.

The fact that a rate of compensation is fixed, which is generally fair and equitable, would not bar an individual owner from recovering the value of his property.<sup>397</sup>

In England, under the Compensation Defence Act of 1939, and several of the Defence Regulations,<sup>398</sup> no account is to be taken of appreciation in value due to the war. Unless the government fixes land sale values generally, a cause for complaint may well arise, not merely from the owner whose property is taken by the government, but from the public at large who look sourly at the favored position of the government while they watch land values go beyond their meager pocketbooks.<sup>399</sup>

If the government fixes a price to itself above that at which the article may generally be sold, some difficulty exists under the doctrine that just compensation must be just to the government as well as to the owner. The courts have permitted the legislature to grant a greater recovery than the courts themselves would have allowed.<sup>400</sup> A price which enables an entrepreneur to carry on his activities at a reasonable return would undoubtedly be upheld, even though the government pays him more than it would pay another for the same article, where the government, in aid of the war effort, needs the article.

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small segment of the market which was free.

*But cf.* 53 STAT. 1255, 46 U. S. C. § 1242 (1939), providing, in respect to requisitioning of ships, that "in no case shall the value of the property taken or used be deemed enhanced by causes necessitating the taking or use." *Cf. Hearings before the S. Com. on Commerce on S. J. Res. 67 and H. R. 4466*, 77th Cong., 1st Sess., p. 25.

<sup>397</sup>*Gulf Refining Co. v. United States*, 58 Ct. Cls. 559 (1923).

<sup>398</sup>*E.g.*, Reg. 51a. See Note, (1940) 84 SOL. J. 387. This has been criticized on the ground that the State gets the benefit of depreciation but does not give credit for appreciation. It has been defended on the ground that it is undesirable that taxpayers' money should be spent on inflated values, and unfair to the taxpayer to pay more than the depreciated value. Report of Mr. Morris on the requisitioning of land and buildings and the operation of the Compensation (Defence) Act, 1939, Cmd. 6313 (1941). *Cf.* Canadian Orders in Council, Order of March 17, 1917, Canadian Statutes (1917) CVIII-CIX: If by order of Governor General in Council it is declared that compensation shall not exceed a certain amount ("which may be a nominal sum") then the right to compensation recoverable is not to exceed such sum.

<sup>399</sup>See *THE ECONOMIST*, December 13, 1941, p. 715. As a post war measure to insure proper planning and to discourage land speculation, large scale nationalization of land has been seriously discussed. *THE ECONOMIST*, January 10, 1942, p. 31.

<sup>400</sup>*Cf. Dohany v. Rogers*, 281 U. S. 362 (1930); *Goslin Mfg. Co. v. Providence*, 262 U. S. 668 (1933).

The Government has been authorized to pay more than ceiling prices on a number of items. *E.g.*, Office of Price Administration, Press Release, PM 3610, June 10, 1942.



5. *Interest*.—The first world war cases firmly established the principle that interest upon the compensation award is part of the just compensation to which an owner is entitled under eminent domain.<sup>401</sup> Since a right to compensation is of diminishing value if it is not promptly payable, fairness to the claimant justifies the addition of interest from the time of the taking until the time of payment,<sup>402</sup> but if the award is no greater than the amount initially tendered, no interest is required.<sup>403</sup> Where the government makes a partial payment after a taking, compensation is computed on the basis of the amount found due plus the amount of interest from the date of the taking to the date of the partial payment, less the amount of the partial payment plus the interest on the difference from the date of the partial payment until full payment is made.<sup>404</sup>

In New York, when a mortgagee asserted his rights to the award in the condemnation proceeding, it was held that he was entitled to interest pending payment of the award at the rate the condemnor must pay, and not at the rate fixed in the mortgage.<sup>405</sup>

Where the government has taken possession, pending the taking of the estate desired, in condemnation proceedings interest is recoverable not *qua* interest, but as a pragmatic method of valuing the period of use and occupation.<sup>406</sup> It would seem to follow, therefore, that in the absence of a taking of possession or title, no interest would run on the award.<sup>407</sup> At least one federal court, however, has held to the contrary.<sup>408</sup>

No particular interest rate is fixed by the Constitution for eminent domain

<sup>401</sup>*Liggett & Myers v. United States*, 274 U. S. 215 (1927); *Phelps v. United States*, 274 U. S. 341 (1927). Interest is recoverable whether the taking is in condemnation proceedings or without resort to condemnation. See *State Highway Commission v. Mason*, — Miss. —, 6 So. (2d) 468 (1942). But there is a difference of opinion among the Circuit Courts of Appeals as to whether the interest part of the award is to be treated as capital or income for tax purposes. See *Comm'r of Internal Revenue v. Kieselback*, 10 U. S. L. WEEK 2677 (1942).

<sup>402</sup>In condemnation proceedings, a check is deposited in court as payment. Since it comes from Washington, it is necessary to compute interest for several days after the check is drawn.

<sup>403</sup>*Luckenbach S. S. Co. v. United States*, 272 U. S. 536 (1927).

<sup>404</sup>*DeLuca v. United States*, 84 Ct. Cls. 217 (1936). Interest on the part of the award initially offered is not recoverable. *Curtis v. United States*, 65 Ct. Cls. 139 (1928). *Mattern & Carre v. United States*, 66 Ct. Cls. 559 (1928).

<sup>405</sup>*Muldoon v. Mid-Bronx Holding Corp.*, — N. Y. —, 29 N. E. (2d) 217 (1942).

<sup>406</sup>*E.g.*, *United States v. 62 Parcels of Land*, 22 F. Supp. 540 (D. Del. 1938).

<sup>407</sup>The form of judgment entered on an award where there has been no taking is a conditional judgment that the estate shall vest in the United States upon payment. Since there is no right to compensation (the United States may abandon after the judgment and prior to the taking) at the time of the award, the basis for starting the interest running is lacking, especially since the claimant's possession has not been disturbed. And, since the measure of just compensation is a federal question, conformity cannot be used to bring about a contrary result.

<sup>408</sup>*Morton Butler Timber Co. v. United States*, 91 F. (2d) 884 (C. C. A. 6th 1937).

proceedings; the interest rate adopted may, but need not, be the legal rate of interest in the locality of the taking.<sup>409</sup>

### VIII. DAMAGE FROM HOSTILE ACTION

No prior wars have witnessed the extent of property destruction which this war has brought with it. The airplane, with its destructive cargo, has brought most countries face to face with an awesome social and economic problem: What should be done for the owner whose property has been damaged or destroyed? Apparently, no country has been willing to face this problem squarely in the initial stages of the war. Nations have not acknowledged any traditional right of compensation for loss suffered from enemy action.<sup>410</sup> But at present, there are few nations engaged in the present struggle which have not fixed by law some scheme of compensation.

Before discussing this development, it is well to point out that any comprehensive scheme of compensation should provide for injury suffered from war operations as well as from enemy action. The owner of a house destroyed by anti-aircraft fire should be in no worse position than one whose home is destroyed by an Axis bomb. A statute providing for recovery for injury from "enemy action" would seem to be too narrow, unless liberally construed.

In England, in 1937, and shortly after the war began, the government took the attitude that it was not practicable to cover war risks on land because of the fear of large scale damage and of possible unlimited financial drain on the public purse. For a while help was given to real property owners largely by way of facilitating repairs to damaged structures.<sup>411</sup> The War Risks Insurance Act, passed on August 4, 1939,<sup>412</sup> together with a number of statutory rules and orders, effected a scheme of compulsory insurance—with some exceptions—for stock in trade. The War Damage Act of March 26, 1941, is an elaborate statute providing for compulsory insurance as to certain types of property, and voluntary insurance as to other types. Value payments were fixed on a basis as of March 31, 1939. The amount of actual damage has not approached the estimate upon which contributions were based.<sup>413</sup> In respect to goods which have suffered war damage, rationing

<sup>409</sup>See Kaplan, *Interest Obligations in the State of New York with Especial Reference to Condemnation* (1941) 11 BROOKLYN L. REV. 63, 71.

<sup>410</sup>In France there has been considerable debate as to whether or not there is a right to compensation for such injuries. See Duguit, *Compensation for War Losses* (1919) 13 ILL. L. REV. 565, 568. The United States is familiar with the French Spoilation claims of interminable history in the Court of Claims.

<sup>411</sup>(1940) 121 ROUND TABLE 187. Cf. Housing (Emergency Powers) Act, Sept. 1, 1939; Essential Buildings and Plant (Repair of War Damage) Act (1939).

<sup>412</sup>2 & 3 GEO. VI, c. 57.

<sup>413</sup>The Act has been criticized for this reason, as well as an alleged gratuity to

restrictions have been eased to facilitate replacement and the sale of damaged goods.<sup>414</sup>

Italy, by a Decree-Law of October 26, 1940, passed a Compensation for War Losses Act which provided compensation for war damages and emphasized the states' desire to effect a replacement in capital goods.<sup>415</sup> Germany,<sup>416</sup> Australia,<sup>417</sup> and Canada,<sup>418</sup> in that order, have thought it wise to prepare for compensating war damage.

In the United States, shortly after the attack on Pearl Harbor, the Reconstruction Finance Corporation created a subsidiary—the War Insurance Corporation.<sup>419</sup> This corporation has been superseded by the War Damage Corporation, and through that corporation Congress has provided for a system of voluntary insurance for property damage.<sup>420</sup>

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mortgagees not required to contribute. See *THE ECONOMIST*, December 13, 1941; *THE ECONOMIST*, January 10, 1942.

<sup>414</sup>Miscellaneous Order No. 11 (1941); S. R. & O. No. 1237 (1941); S. R. & O. Nos. 1451, 1452 (1941); S. R. & O. No. 2061 (1941).

<sup>415</sup>Art. 6. " \* \* \* The State shall always have the right to provide, instead of the indemnity machines, furniture, merchandise, or livestock of the same kind and of equivalent value to those damaged or destroyed."

Art. 8. "Compensation for immovable goods and for industrial plants is conditioned upon their reemployment, to be accompanied by restoring to their former condition the goods damaged or destroyed." Cf. Duguit, *Compensation for War Losses* (1919) 13 *ILL. L. REV.* 565, as to the debate in France on whether compensation should be conditioned upon an obligation to restore.

<sup>416</sup>Pfundtner-Neubert, *Das Neue Deutsche Reichsrecht*, I RV 12, p. 1-66.

<sup>417</sup>AUSTRALIA, January, 1942, p. 7.

<sup>418</sup>See (May 2, 1942) 7 *FOR. COM. WEEKLY* 14.

<sup>419</sup>Information Digest, December 23, 1941.

<sup>420</sup>Pub. L. No. 506, 77th Cong., 2d Sess.